TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940 1941

No. 586 / 5

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, APPELLANT,

vs.

DOROTHEA T. FRANK

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

FILED NOVEMBER 30, 1940.

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[fol. 1]

IN MUNICIPAL COURT OF THE CITY OF NEW YORK, BOROUGH OF MANHATTAN, NINTH DISTRICT

DOROTHEA T. FRANK, Plaintiff,

against

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, Defendant

COMPLAINT

Plaintiff, by House, Grossman, Vorhaus & Hemley, her attorneys, complains of the defendant:

For a First Cause of Action

First. Plaintiff is a resident of the State of New York, residing in the Borough of Manhattan, New York City.

Second. Upon information and belief, defendant is a domestic corporation.

Third. On or about the 1st day of October, 1895, at the Borough of Manhattan, New York City, The Northern Ohio Railway Company, for value received, made, issued and delivered its certain coupon numbered 87, attached to its certain bond numbered 261, wherein and whereby it promised to pay to bearer on the 1st day of April, 1939, at its agency in the City of New York, the sum of Twenty-five ($25.00) Dollars.

[fol. 2] Fourth. Prior to the delivery of the said coupon, The Lake Erie & Western Railroad Company, for value received, guaranteed the punctual payment of the said coupon.

Fifth. Upon information and belief, prior to the maturity of the said coupon, said The Lake Erie & Western Railroad Company merged with the defendant, and upon said merger the defendant assumed and promised and agreed to pay and discharge the debts, liabilities and obligations of said The Lake Erie & Western Railroad Company, including its liability upon said coupon.

Sixth. Plaintiff is, and at and prior to the maturity of said coupon was, the lawful owner and holder thereof.

Seventh. The said coupon matured on April 1st, 1939, and payment thereof was demanded and refused.

Eighth. By reason of the premises, there is now due and owing from the defendant to the plaintiff the sum of Twenty-five ($25.00) Dollars, with interest thereon from the 1st day of April, 1939.

For a Second Cause of Action

Ninth. Plaintiff repeats and makes part of this cause of action each of the allegations contained in the paragraphs of this complaint designated "First" and "Second".

[fol. 3] Tenth. On or about the 1st day of October, 1895, at the Borough of Manhattan, New York City, The Northern Ohio Railway Company, for value received, made, issued and delivered its certain coupon numbered 87, attached to its certain bond numbered 1062, wherein and whereby it promised to pay to bearer on the 1st day of April, 1939, at its agency in the City of New York, the sum of Twenty-five ($25.00) Dollars.

Eleventh. Prior to the delivery of the said coupon, The Lake Erie & Western Railroad Company, for value received, guaranteed the punctual payment of the said coupon.

Twelfth. Upon information and belief, prior to the maturity of the said coupon, said The Lake Erie & Western Railroad Company merged with the defendant, and upon said merger the defendant assumed and promised and agreed to pay and discharge the debts, liabilities and obligations of said The Lake Erie & Western Railroad Company, including its liability upon said coupon.

Thirteenth. Plaintiff is, and at and prior to the maturity of said coupons was, the lawful owner and holder thereof.

Fourteenth. The said coupon matured on April 1st, 1939, and payment thereof was demanded and refused.

Fifteenth. By reason of the premises, there is now due and owing from the defendant to the plaintiff, the sum of [fol. 4] Twenty-five ($25.00) Dollars, with interest thereon from the 1st day of April, 1939.

For a Third Cause of Action

Sixteenth. Plaintiff repeats and makes part of this cause of action each of the allegations contained in the paragraphs of this complaint designated "First" and "Second".

Seventeenth. On or about the 1st day of October, 1895, at the Borough of Manhattan, New York City, The Northern Ohio Railway Company, for value received, made, issued and delivered its certain coupon numbered 87, attached to its certain bond numbered 1459, wherein and whereby it promised to pay to bearer on the 1st day of April, 1939, at its agency in the City of New York, the sum of Twenty-five ($25.00) Dollars.

Eighteenth. Prior to the delivery of the said coupon, The Lake Erie & Western Railroad Company, for value received, guaranteed the punctual payment of the said coupon.

Nineteenth. Upon information and belief, prior to the maturity of the said coupon, said The Lake Erie & Western Railroad Company merged with the defendant, and upon said merger the defendant assumed and promised and agreed to pay and discharge the debts, liabilities and obliga- [fol. 5] tions of said The Lake Erie & Western Railroad Company, including its liability upon said coupon.

Twentieth. Plaintiff is, and at and prior to the maturity of said coupon was, the lawful owner and holder thereof.

Twenty-First. The said coupon matured on April 1st, 1939 and payment thereof was demanded and refused.

Twenty-Second. By reason of the premises, there is now due and owing from the defendant to the plaintiff the sum of Twenty-five ($25.00) Dollars, with interest thereon from the 1st day of April, 1939.

For a Fourth Cause of Action

Twenty-Third. Plaintiff repeats and makes part of this cause of action each of the allegations contained in the paragraphs of this complaint designated "First" and "Second."

Twenty-Fourth. On or about the 1st day of October, 1895, at the Borough of Manhattan, New York City, The Northern Ohio Railway Company, for value received, made, issued and delivered its certain coupon numbered 87, attached to

its certain bond numbered 2354, wherein and whereby it promised to pay to bearer on the 1st day of April, 1939, at its agency in the City of New York, the sum of Twenty-five ($25.00) Dollars.

[fol. 6] Twenty-fifth. Prior to the delivery of the said coupon, The Lake Erie & Western Railroad Company, for value received, guaranteed the punctual payment of the said coupon.

Twenty-sixth. Upon information and belief, prior to the maturity of the said coupon, said The Lake Erie & Western Railroad Company merged with the defendant, and upon said merger the defendant assumed and promised and agreed to pay and discharge the debts, liabilities and obligations of said The Lake Erie & Western Railroad Company, including its liability upon said coupon.

Twenty-seventh. Plaintiff is, and at and prior to the maturity of said coupon was, lawful owner and holder thereof.

Twenty-eighth. The said coupon matured on April 1st, 1939, and payment thereof was demanded and refused.

Twenty-ninth. By reason of the premises, there is now due and owing from the defendant to the plaintiff the sum of Twenty-five ($25.00) Dollars, with interest thereon from the 1st day of April, 1939.

For a Fifth Cause of Action

Thirtieth. Plaintiff repeats and makes part of this cause of action each of the allegations contained in the para-[fol. 7] graphs of this complaint designated "First" and "Second".

Thirty-first. On or about the 1st day of October, 1895, at the Borough of Manhattan, New York City, The Northern Ohio Railway Company, for value received, made, issued and delivered its certain coupon numbered 87, attached to its certain bond numbered 2355, wherein and whereby it promised to pay to bearer on the 1st day of April, 1939, at its agency in the City of New York, the sum of Twenty-five ($25.00) Dollars.

Thirty-second. Prior to the delivery of the said coupon, The Lake Erie & Western Railroad Company, for value

received, guaranteed the punctual payment of the said coupon.

Thirty-third. Upon information and belief, prior to the maturity of the said coupon, said The Lake Erie & Western Railroad Company merged with the defendant, and upon said merger the defendant assumed and promised and agreed to pay and discharge the debts, liabilities and obligations of said The Lake Erie & Western Railroad Company, including its liability upon said coupon.

Thirty-fourth. Plaintiff is, and at and prior to the maturity of said coupon was, the lawful owner and holder thereof.

Thirty-fifth. The said coupon matured on April 1st, 1939 and payment thereof was demanded and refused.

[fol. 8] Thirty-sixth. By reason of the premises, there is now due and owing from the defendant to the plaintiff, the sum of Twenty-five ($25.00) Dollars, with interest thereon from the 1st day of April, 1939.

Wherefore, plaintiff demands judgment against the defendant for the sum of One hundred and twenty-five and 00/100 ($125.00) Dollars, with interest thereon from the 1st day of April, 1939, together with the costs and disbursements of this action.

House, Grossman, Vorhaus & Hemley, Attorneys for Plaintiff, Office & P. O. Address, 521 Fifth Avenue, Borough of Manhattan, City of New York.

Verified by Dorothea T. Frank on June 3rd, 1939.

[fol. 9] In Municipal Court of City of New York

Answer

The defendant, by Donovan, Leisure, Newton & Lumbard, its attorneys, answering the complaint herein:

First. Denies on information and belief each and every allegation contained in paragraphs of the complaint numbered and designated "Fourth", "Fifth", "Eighth", "Eleventh", "Twelfth", "Fifteenth", "Eighteenth", "Nineteenth", "Twenty-second", "Twenty-fifth", "Twenty-sixth", "Twenty-ninth", "Thirty-second", "Thirty-third" and "Thirty-sixth".

Second. Denies that it has any knowledge or information sufficient to form a belief as to any of the allegations contained in paragraphs of the complaint numbered and designated "First", "Sixth", "Seventh", "Thirteenth", "Fourteenth", "Twentieth", "Twenty-first", "Twenty-seventh", "Twenty-eighth", "Thirty-fourth", "Thirty-fifth" and in so much of the paragraphs of the complaint numbered and designated "Ninth", "Sixteenth", "Twenty-third" and "Thirtieth" as repeats and realleges the allegations contained in said paragraph "First".

And the defendant further alleges on information and belief:

[fol. 9a] For a First, Complete and Separate Defense to All Five Causes of Action

Third. That said The Lake Erie & Western Railroad Company referred to in paragraphs of the complaint numbered and designated "Fourth", "Fifth", "Eleventh", "Twelfth", "Eighteenth', "Nineteenth", "Twenty-fifth", "Twenty-sixth", "Thirty-second" and "Thirty-third" was an Illinois corporation organized on or about February 10, 1887, under and pursuant to the provisions of Chapter 114 of the Revised Statutes of Illinois, entitled "Railroads and Warehouses".

Fourth. That the alleged purported guaranties referred to in said paragraphs of the complaint are endorsed upon each of said bonds of The Northern Ohio Railway Company therein referred to and are in words and figures as follows:

"For value received, the Lake Erie and Western Railroad Company hereby guarantees the punctual payment of the principal of the within bond at its maturity, and of the interest coupons hereto attached as they respectively become due in accordance with the terms, tenor and conditions thereof."

Fifth. That said alleged purported guaranties, if there were any such, were accommodation guaranties, and that said The Lake Erie & Western Railroad Company had no power, either under its charter or under the statutes under which it was incorporated, to make accommodation guaranties of the principal of and the interest coupons attached to said bonds.

[fol. 10] And for a Second, Complete, Separate and Distinct Defense to All Five Causes of Action

Sixth. That this defendant was formed as a consolidated corporation under and pursuant to the laws of the several States of New York, Pennsylvania, Ohio, Indiana and Illinois on or about the 11th day of April, 1923.

Seventh. That said consolidation took place in accordance with the provisions of an Agreement and Articles of Consolidation, under date of December 28, 1922, by and between the former The New York, Chicago & St. Louis Railroad Company, the former The Chicago State Line Railroad Company, the former The Lake Erie & Western Railroad Company, the former Fort Wayne, Cincinnati & Louisville Railroad Company, and the former Toledo, St. Louis & Western Railroad Company.

Eighth. That this defendant was organized as aforesaid for the purpose of engaging in transportation by railroad subject to the Interstate Commerce Act.

Ninth. That thereafter, as required by Section 1 of the Interstate Commerce Act, this defendant was duly authorized by the Interstate Commerce Commission to and, pursuant to said authorization, did acquire and commence to operate the properties of its said constituent companies as [fol. 11] provided in said Agreement and Articles of Consolidation, and this defendant then became and ever since has been a common carrier by railroad subject to the Interstate Commerce Act.

Tenth. That the material portion of Section 20 a of the Interstate Commerce Act (41 Stat. 494, 49 U. S. C., Sec. 20-a) now provides and at all times since February 28, 1920, has provided as follows:

"Sec. 20a (1) That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier

to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption * * *''

[fol. 12] (7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.''

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commisison is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption * * *''

Eleventh. That this defendant has never been authorized by said Interstate Commerce Commission to assume or to agree to perform said alleged purported guarantees of the said The Lake Erie & Western Railroad Company, and this defendant has never assumed nor agreed to perform said alleged purported guaranties.

Wherefore, this defendant demands judgment dismissing the complaint with costs.

Donovan, Leisure, Newton & Lumbard, Attorneys for Defendant, Office & Post Office Address, No. 2 Wall Street, Borough of Manhattan, New York City.

[fol. 13] *Duly sworn to by David Teitelbaum. Jurat omitted in printing.*

[fol. 14] In Municipal Court of City of New York

Notice of Plaintiff's Motion for Summary Judgment

Sirs:

Please take notice that upon the pleadings herein, upon the admissions of facts made by defendant, pursuant to § 323 of the Civil Practice Act, by notice in writing, dated November — 1939, and upon the annexed affidavit of Dorothea T. Frank, sworn to the 22nd day of December, 1939, the plaintiff will move, at a Special Term of this Court, appointed to be held in Part 3 thereof, at the Central Motion Part, at No. 8 Reade Street, in the Borough of Manhattan, New York City, on the 9th day of January, 1940, at 1:30 P. M., or as soon thereafter as counsel can be heard, that pursuant to the provisions of Rule 113 of the Rules of Civil Practice the answer be stricken out and summary judgment entered in favor of the plaintiff and against the defendant as demanded in the complaint herein; and for such other or further relief in the premises as may be just.

Affidavits to be used in answering this motion must be served at least five (5) days before the hearing.

[fol. 15] Dated: New York, December 30th, 1939.

Yours, etc., House, Grossman, Vorhaus & Hemley, Attorneys for Plaintiff, No. 521 Fifth Avenue, New York, N. Y.

To: Donovan, Leisure, Newton & Lumbard, Esqs., Attorneys for Defendant, No. 2 Wall Street, New York, N. Y.

[fol 16] In Municipal Court of City of New York

Affidavit of Dorothea T. Frank in Support of Plaintiff's Motion for Summary Judgment

State of New York,
County of New York, ss:

Dorothea T. Frank, being duly sworn, deposes and says:

I am the plaintiff herein. I am and at and prior to the commencement of this action was a resident of the City, County and State of New York. I reside at No. 24 West

90th Street, in the Borough of Manhattan, City of New York.

I am and at and prior to the commencement of this action was the owner of the five bonds mentioned in the complaint herein, to wit,—First Mortgage Five Percent Gold Bonds of The Northern Ohio Railway Company, for the face amount of One Thousand ($1,000) Dollars each, numbered, respectively, 261, 1062, 1459, 2354 and 2355, dated October 1, 1895, and due October 1, 1945, and also of the several interest coupons attached thereto described in the complaint, each of said coupons being numbered 87, each for the sum of Twenty-five ($25) Dollars, payable April [fol. 17] 1, 1939.

Each of said bonds bears this endorsement:

"Guarantee

For value received, The Lake Erie and Western Railroad Company hereby guarantees the punctual payment of the within bond at its maturity, and of the interest coupons hereto attached, as they consecutively become due, in accordance with the terms, tenor and conditions thereof.

The Lake Erie and Western Railroad Company, By L. M. Schwan, V. President.

Attest: Sam Shortridge, Secretary. (Seal of The Lake Erie and Western Railroad Company)."

The said bonds, together with the said coupons and all subsequently maturing coupons thereto attached, will be produced upon the hearing of this motion.

I purchased these bonds on the open market, through a firm of brokers, on the 31st day of July, 1936, and paid therefor the sum of $750 each, with accrued unpaid interest. I bought them as an investment, without notice of any defense thereto or to the guarantee thereof. All coupons at that time unmatured were attached thereto.

In response to a demand made, pursuant to the provisions of § 323 of the Civil Practice Act, defendant has by written notice admitted, for the purpose of this cause only, [fol. 18] certain specific facts. Such admissions will be submitted herewith.

It appears from the answer herein and from such admissions that defendant is a consolidated corporation, formed under and pursuant to the laws of the States of New York,

Pennsylvania, Ohio, Indiana and Illinois on or about April 11th, 1923, pursuant to an agreement of consolidation, dated December 28th, 1922. It further appears from such admissions that the former The New York, Chicago & St. Louis Railroad Company, one of the constituents of said consolidated corporation, was at the time of the consolidation a corporation organized under the laws of New York, Pennsylvania, Ohio and Indiana, and from the answer and admissions that the former The Lake Erie & Western Railroad Company, another constituent of said consolidated corporation, was at that time and at the time of the endorsement of its guaranties above mentioned a corporation organized under the laws of the State of Illinois.

I am advised that by applicable statutes the liabilities incurred prior to consolidation by any of the constituent corporations attach after consolidation to such new corporation and are enforcible against it.

No part of the sum payable on any of the coupons described in the complaint has been paid and there is now [fol. 19] due and owing to me upon each of said five coupons the sum of Twenty-five ($25) Dollars, making in all One Hundred and Twenty-five ($125) Dollars, with interest thereon from April 1, 1939, for which amount, with interest, judgment is demanded in the complaint herein.

The second defense alleges in substance that the Defendant, an interstate carrier, was never authorized by the Interstate Commerce Commission to assume or to agree to perform the guaranties.

I have been advised by my attorneys that the provisions of § 20 (a) of the Interstate Commerce Act, to which reference is made in the second defense, have no application whatsoever to the liabilities of constituent companies which, by virtue of statutory provisions, attach upon consolidation to the new corporation and that as a matter of law the second defense is untenable.

I verily believe there is no defense to the action.

Dorothea T. Frank.

Verified December 22, 1939.

[fol. 20] In Municipal Court of City of New York

Admissions of Defendant

Sirs:

Please Take Notice that in response to the plaintiff's demand, pursuant to Section 323 of the Civil Practice Act, the defendant, for the purpose of this cause only, and without conceding the materiality of all or any of the matters referred to in said demand or in this response thereto:

1. Admits that on or about October 1, 1895, the Northern Ohio Railway Company was the owner of a line of railway extending from Main Street in Akron to Delphos in the State of Ohio.

2. Admits that on or about October 1, 1895, said The Northern Ohio Railway Company made, executed and delivered a certain indenture of mortgage to Central Trust Company of New York, bearing date on said day, to secure an issue of 4,000 bonds, in the face amount of $1,000 each, designated First Mortgage 5% Gold Bonds and covering said railroad of the mortgagor.

3. Admits that of said issue, bonds numbered respectively, 1 to 2500 inclusive, were to be and were then issued, [fol. 21] and the remaining bonds numbered 2501 to 4000 were reserved to be issued in connection with possible future construction of extensions to the mortgagor's line of railway.

4. Admits that Lake Erie & Western Railroad Company was organized as a corporation on or about February 1, 1887, under and pursuant to Chapter 114 of the Revised Statutes of the State of Illinois, entitled "Railroads and Warehouses", and the said The Lake Erie & Western Railroad Company was engaged in the operation of a line of railway for many years before and since October 1, 1895.

5. Admits that on or about October 1, 1895 an indenture of lease of the said line of railway of The Northern Ohio Railway Company was executed and delivered by and between The Northern Ohio Railway Company as lessor and The Lake Erie & Western Railroad Company, as lessee, and that thereupon said The Lake Erie & Western Railroad Company took possession of the said line of railway.

A copy of said indenture marked Exhibit "A" is annexed hereto and made a part hereof.

6. Admits that at or about the time of the making of said indenture of lease there was endorsed upon each of said bonds numbered from 1 to 2500 inclusive, by the Vice-President and Secretary of The Lake Erie & Western Railroad [fol. 22] Company, the words and figures following:

"Guarantee

For value received, The Lake Erie and Western Railroad Company hereby guarantees the punctual payment of the within bond at its maturity, and of the interest coupons hereto attached, as they consecutively become due, in accordance with the terms, tenor and conditions thereof.

The Lake Erie and Western Railroad Company. By L. M. Schwan, V. President.

Attest: Sam Shortridge, Secretary. (Seal of The Lake Erie and Western Railroad Company)."

and that said officers affixed to each of said endorsements the corporate seal of The Lake Erie & Western Railroad Company.

7. Admits that this defendant was formed as a consolidated corporation under and pursuant to the laws of the several States of New York, Pennsylvania, Ohio, Indiana and Illinois on or about the 11th day of April, 1923. Admits that said consolidation took place in accordance with the provisions of an agreement and articles of Consolidation under date of December 28, 1922, by and between the former The New York, Chicago & St. Louis Railroad Company, the former The Chicago State Line Railroad Company, the former The Lake Erie & Western Railroad Company, the former Fort Wayne, Cincinnati & Louisville Railroad Company, and the former Toledo, St. Louis & Western Railroad Company. Admits that the former The New York, Chicago & St. Louis Railroad Company was, at the time of the making of said agreement, a corporation or- [fol. 23] ganized under the laws of the States of New York, Pennsylvania, Ohio and Indiana, the former The Chicago State Line Railroad Company, a corporation organized under the laws of the State of Illinois, the former The Lake Erie & Western Railroad Company, a corporation organ-

ized under the laws of the State of Illinois, the former Fort Wayne, Cincinnati & Louisville Railroad Company, a corporation organized under the laws of the State of Indiana, and the former Toledo, St. Louis & Western Railroad Company, a corporation organized under the laws of the State of Indiana.

8. Admits that thereafter this defendant was duly authorized by the Interstate Commerce Commission to and, pursuant to said authorization did, acquire and commence to operate the properties of its said constituent companies as provided in said agreement and Articles of Consolidation.

9. Admits that this defendant was duly authorized by the Interstate Commerce Commission and, pursuant to said authorization did issue its own capital stock in exchange for the capital stock of said constituent companies as provided in said agreement and Articles of Consolidation.

Except as hereinbefore expressly admitted, this defendant declines to admit any of the matters stated in any of the items contained in plaintiff's said demand, nor does the defendant by any admission herein made, admit that [fol. 24] it was ever authorized by the Interstate Commerce Commission to assume any obligation or liability in respect of the said bonds of The Northern Ohio Railway Company referred to in item 12 of plaintiff's said demand, nor that it has ever assumed any obligation or liability in respect of said bonds.

Yours, etc., Donovan, Leisure, Newton & Lumbard, Attorneys for Defendant. Office and P. O. Address, No. 2 Wall Street, Borough of Manhattan, New York, N. Y.

Dated, N. Y., November —, 1939.

To: House, Grossman, Vorhaus & Hemley, Esqs., Attorneys for Plaintiff. Office & P. O. Address, No. 521 Fifth Avenue, Borough of Manhattan, New York, N. Y.

[fol. 25] In Municipal Court of City of New York

Notice of Defendant's Cross-Motion for Summary Judgment

Sirs:

Please Take Notice that on the annexed affidavits of H. F. Lohmeyer, G. A. Wallis, C. C. Collister, Harry W. Sturges, Jr., and Theodore Sherwood Hope, Jr., sworn to the 19th day of January, 1940, the 19th day of January, 1940, the 19th day of January, 1940, the 20th day of January, 1940 and the 20th day of January, 1940, respectively, and on the complaint herein, verified the 3rd day of June, 1939, and on the answer of the defendant herein, verified the 31st day of July, 1939, and on the papers submitted by the plaintiff on her motion for summary judgment herein, and on all the pleadings herein, and all the proceedings heretofore had herein, the undersigned will move this Court, by way of cross-motion to plaintiff's said motion for summary judgment, at the same time and place plaintiff's said motion is now returnable, i. e. at a Special Term, Part III of the Central Motion Part of this Court, to be held at No. 8 Reade Street, in the Borough of Manhattan, City and State of New York, on the 24th day of January, 1940, at 1:30 o'clock in the afternoon of that day, or as soon thereafter as counsel [fol. 26] can be heard, for an order pursuant to Rule 113 of the Rules of Civil Practice, dismissing the complaint herein and directing the entry of judgment in favor of the defendant, on the ground that this action has no merit, and for such other, further and different relief as to the Court may seem just, together with the costs of this motion.

Yours, &c. Donovan, Leisure, Newton & Lumbard, Attorneys for Defendant, Office & Post Office Address, 2 Wall Street, Borough of Manhattan, New York, N. Y.

Dated: New York, January 20, 1940.

To: House, Grossman, Vorhaus & Hemley, Attorneys for Plaintiff, Office and P. O. Address, 521 Fifth Avenue, Borough of Manhattan, New York, N. Y.

[fol. 27] In Municipal Court of City of New York

Affidavit in Support of Cross-Motion for Summary Judgment

State of New York,
County of New York, ss:

Theodore Sherwood Hope, Jr., being duly sworn, deposes and says:

1. I am a member of the Bar of the State of New York, am associated with the firm of Donovan, Leisure, Newton & Lumbard, the attorneys for the defendant in the above entitled action, and make this affidavit on behalf of said defendant in support of its motion for summary judgment and in opposition to the cross-motion of the plaintiff for summary judgment.

2. The issues under the pleadings: This action is brought by the plaintiff upon an alleged guaranty by the former The Lake Erie & Western Railroad Company (hereinafter called the "L. E. & W.") of principal and interest of certain bonds issued by the Northern Ohio Railway Company (hereinafter called the "Northern Ohio") and alleged to be now held by the plaintiff. The defendant was formed as a consolidated corporation by a consolidation of the L. E. & W. with a number of other railroad corporations and is alleged to have assumed by said consolidation an obligation in respect of these bonds as guarantor thereof.

[fol. 28] The plaintiff's cause of action thus consists of three main elements:

(1) The plaintiff's alleged ownership of the bonds in question and their appurtenant coupons.

In view of the statements and undertakings contained in plaintiff's affidavits, it seems that no issue of fact or law will be presented with respect to this element of her case.

(2) The alleged guaranty by the L. E. & W.

The defendant's answer denies that this alleged guaranty was the act of the L. E. & W. and pleads affirmatively as its First Defense that it was ultra vires that corporation, under its charter and the laws of the State of Illinois under which it was organized. It is not denied that the alleged guaranty was endorsed on the Northern Ohio bonds by officers of the

L. E. & W. under the purported authority of a resolution of its Board of Directors. However, the power of the L. E. & W. to make the alleged guaranty and thus, their authority to cause it to make the same, are denied. The issues presented by this defense are issues of fact.

(3) The defendant's alleged assumption, under Section 143 of the New York Railroad Law, of the L. E. & W.'s alleged obligation as guarantor of the Nor'hern Ohio bonds.

The defendant was formed as a consolidated corporation [fol. 29] having the L. E. & W. as one of its constituents. Section 143 of the Railroad Law provides that such a consolidated corporation, by its formation, assumes the liabilities of its constituents. The defendant's answer pleads affirmatively as its Second Defense that it never applied for nor received authorization from the Interstate Commerce Commission, as required by Section 20(a) of the Interstate Commerce Act, to assume any obligation in respect of the Northern Ohio bonds, as guarantor or otherwise. The facts as to this defense are not in dispute and the only issue presented thereby is an issue of law.

3. The defendant's cross-motion for summary judgment:

The defendant's cross-motion for summary judgment is based solely on the second defense set out in its answer, which has just been described. In deference to the rule that questions of implied corporate power will not ordinarily be determined on motion for summary judgment, defendant's cross-motion is not based on its first defense of ultra vires. Section 20(a) of the Interstate Commerce Act expressly provides:

"(1) *Carrier defined.* As used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this chapter, or any corporation organized for the purpose of engaging in transportation by railroad subject to this chapter.

[fol. 30] "(2) *Issuance of securities; assumption of obligations; authorization.* It shall be unlawful for any carrier * * * to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect

of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses * * * of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such * * * assumption * * *"

And provides further:

"(11) *Securities issued contrary to law void; effect; penalty.* "Any * * * obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if * * * assumed without such authorization therefore having first been obtained * * *"

The defendant was organized as a railroad corporation, for the purpose of engaging in and is engaged in interstate commerce, and thus was, is and always has been a "carrier" as defined in said Section 20(a).

It appears from the affidavits of H. F. Lohmeyer and C. C. Collister, submitted herewith, and from the letter of the Secretary of the Interstate Commerce Commission, hereafter set forth, that the defendant never applied for nor received authorization from the Interstate Commerce Commission under Section 20(a) of the Interstate Commerce Act to assume any liability or obligation, as lessor, lessee, guarantor, surety, or otherwise, in respect of bonds of the [fol. 31] Northern Ohio Railway Company.

Said letter was written in response to my written inquiry and was in words and figures as follows:[1]

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[1] Except for such passage commencing on page 5 thereof, the Commission's report of November 10, 1939, referred to in the second paragraph of said letter, has no possible bearing on the present controversy, but deals merely with the amount of compensation to be paid to various persons and their counsel in connection with the reorganization of the Northern Ohio Railway Company. Your deponent does not believe that said passage is material, but for the sake of

[fol. 32] "INTERSTATE COMMERCE COMMISSION

Office of the Secretary

Washington

W. P. Bartel, Secretary

November 25, 1939.
File No. 697715

Donovan, Leisure, Newton & Lumbard, 2 Wall Street, New York, N. Y.

GENTLEMEN:

In response to your letter of November 22, you are advised that the New York, Chicago & St. Louis Railroad Company has never applied for, nor received authorization pursuant to section 20 (a) of the Interstate Commerce Act to assume any obligation or liability as lessor, lessee, guarantor, endorser, surety, or otherwise in respect of bonds of the Northern Ohio Railway Company.

For further information I would refer you to the discussion beginning at page 5 in the Commission's report of November 10, 1939, in Finance Docket No. 9923, Akron,

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completeness, sets the same out below. Said passage reads as follows:

"The $2,500,000 first-mortgage bonds of the Northern Ohio are guaranteed as to principal and interest not only by the Akron but also by the Lake Erie & Western Railroad Company, hereinafter called the Lake Erie, a predecessor lessee of the property of the Northern Ohio. The Lake Erie was consolidated with the New York, Chicago & St. Louis Railroad Company, hereinafter called the Nickel Plate, which never expressly agreed to assume the liability on the Lake Erie guaranty. That the consolidation had the effect of transferring the guaranty of the Lake Erie to the Nickel Plate appears to be generally assumed by the parties to the reorganization proceeding, but counsel for the Northern Ohio committee asserts that this constituted a fundamental legal question. However, the Akron, when it took the assignment of the lease from the Lake Erie in 1919, agreed to hold the Lake Erie harmless in regard to its guaranty of the principal and interest of the Northern Ohio's bonds, which agreement would inure to the benefit of the Nickel Plate.

This situation created a problem peculiar to the interests

Canton & Youngstown Railway Company and Northern Ohio Railway Company Reorganization, copy of which is enclosed. If you desire to have the report and order certified kindly return the enclosed copy, together with your remittance of 50 cents to cover the cost of certification. Information concerning payment of charges is set forth in the enclosed memorandum.

Respectfully, (Signed) W. P. Bartel, Secretary."

[fol. 33] The reason your deponent sets out said letter in this affidavit instead of furnishing a certificate of the Interstate Commerce Commission, setting out the facts stated in said letter, is that the Secretary of the Intersate Commerce Commission takes the position that he is not authorized to make such certificate.

This defense thus presents no question of fact.

It is not open to dispute that the defendant was, is and always has been a "carrier".

It is not open to dispute that the defendant never applied for nor received I. C. C. authorization to assume any obligation, as guarantor or otherwise, in respect of any Northern Ohio bonds.

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of the Northern Ohio committee which it and its counsel early attempted to solve. Counsel took preliminary steps to enforce the guaranty by legal proceedings and in that connection employed the firm of Smith, Remster, Hornbrook & Smith, of Indianapolis, Ind., that State having been selected as the proper forum in which to bring suit against the Nickel Plate. That firm devoted a substantial part of some seven weeks to a study of the problems presented in preparation for institution and prosecution of a suit. Before the suit was filed, negotiations were had with representatives of the Nickel Plate which resulted in the latter's agreement, through a nominee, to purchase the Northern Ohio bond coupons maturing from April 1, 1933, to April 1, 1938, inclusive. Subsequently, the debtors' trustees paid the first four of the eleven maturities, thus leaving the Nickel Plate the owner of the seven remaining maturities ending April 1, 1938. The contemplated suit was indefinitely deferred, but negotiations with the Nickel Plate looking to final settlement with the Northern Ohio bondholders are still in progress."

The only issue presented by this defense is a pure issue of law.

Although, as appears from the annexed affidavit of C. C. Collister, the defendant never expressly assumed said alleged guaranty of the Lake Erie & Western Railroad Company, defendant was, in 1923, formed under, among others, the Railroad Law of the State of New York by a consolidation of five railroad corporations, among which was the Lake Erie & Western Railroad Company, and Section 143 of the Railroad Law provides in substance that upon its formation a consolidated railroad corporation assumes by implication of law the liabilities of the corporations to which it succeeds. The question is presented, therefore, whether Section 20 (a) of the Interstate Commerce Act or Section [fol. 34] 143 of the Railroad Law controls in the present case.

Defendant contends that where, as in the case at bar, the consolidated corporation is a "carrier" and the liability of its constituent is a liability as guarantor of the bonds of another corporation, such liability cannot be assumed by the consolidated corporation without the authorization of the Interstate Commerce Commission; that section 143 of the Railroad law, in so far as it purports to provide for an assumption of such a liability by a "carrier", is inconsistent with Section 20 (a) of the Interstate Commerce Act; that, accordingly, as applied to the facts of the instant case, Section 143 of the Railroad Law was superseded pro tanto by Section 20 (a) of the Interstate Commerce Act when said Section 20 (a) was enacted in 1920 and finally, that not having been authorized by the Interstate Commerce Commission to assume any liability as guarantor of the Northern Ohio bonds or coupons, defendant cannot be held liable on the basis of any purported assumption of said guaranty, whether said assumption is claimed to have been expressed or implied in fact or implied in law.

The Interstate Commerce Act, of course, overrides all state statutes, being the supreme law of the land.

The present action is not brought against the L. E. & W. It is brought against the defendant, The New York, Chicago and St. Louis Railroad Company. Before it can become material to determine whether or not the L. E. & W. is [fol. 35] liable on the alleged guaranty of the Northern Ohio bonds, it must first be determined whether, even if the L. E. & W.'s liability be assumed, liability on the part of the

defendant can be predicated thereon. If the latter question is resolved in defendant's favor, as it is submitted it must be, the present complaint must be dismissed. In that event, it will not be necessary, in this action, to determine whether or not the L. E. & W. be in fact liable as guarantor of the Northern Ohio bonds and the questions presented by the plaintiff's motion for summary judgment and dealt with in the remaining portion of this affidavit, need not be considered.

* * * * * * *

I believe there is no merit to this action.

Wherefore, it is prayed that this Court make and enter an order granting defendant's cross-motion for summary judgment and that, in any event, plaintiff's motion for summary judgment be denied.

Theodore Sherwood Hope, Jr.

Verified January 20, 1940.

[fol. 36] In Municipal Court of City of New York

Affidavit in Support of Cross-Motion for Summary Judgment

State of ——,
County of ——, ss:

C. C. Collister, being first duly sworn, deposes and says:

I am and ever since the formation in 1923 of The New York, Chicago and St. Louis Railroad Company, the defendant in the above-entitled action, have been the Assistant Secretary thereof. I make this affidavit in support of its cross motion for summary judgment and in opposition to the plaintiff's motion for summary judgment in said action.

At the time of the consolidation hereinafter mentioned, I was the General Attorney and the Assistant Secretary of the former The New York, Chicago and St. Louis Railroad Company, the Secretary of The Lake Erie and Western Railroad Company, and the Secretary of Fort Wayne, Cincinnati and Louisville Railroad Company and had held those offices continuously from June 24, 1922, from June

2, 1922, from May 10, 1922, and from May 26, 1922, respectively.

The defendant was formed by the consolidation, perfected April 11, 1923, of five railroad companies, (including [fol. 37] those named in the immediately preceding paragraph) by and pursuant to an Agreement and Articles of Consolidation made and entered into the 28th day of December, 1922, between the said five companies and their respective boards of directors and under and in accordance with the respective laws of the several States of New York, Pennsylvania, Ohio, Indiana and Illinois. A true copy of said Agreement and Articles of Consolidation is hereto attached, marked "Exhibit A", and hereby made a part hereof. This consolidation has never been approved by the Interstate Commerce Commission, pursuant to Section 5 of the Interstate Commerce Act, and no application to it for such approval has ever been made.

The Interstate Commerce Commission has never authorized, pursuant to Section 20a of the Interstate Commerce Act, the assumption by the defendant of any obligation or liability as lessor, lessee, guarantor, endorser, surety or otherwise in respect of any bonds or bond of The Northern Ohio Railway Company, the corporation of that name mentioned in the complaint in said action, and the defendant has never applied to said Commission for any such authority.

The defendant has never expressly assumed any such obligation or liability.

C. C. Collister.

Verified January 19, 1940.

[fol. 38] ATTACHED TO THE AFFIDAVIT OF C. C. COLLISTER, AS EXHIBIT "A"

is the

AGREEMENT AND ARTICLES OF CONSOLIDATION

dated

December 28, 1922

between

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE CHICAGO AND STATE LINE RAILROAD COMPANY, THE LAKE ERIE AND WESTERN RAILROAD COMPANY, FORT WAYNE, CINCINNATI AND LOUISVILLE RAILROAD COMPANY, and TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY for the consolidation of said companies into one company to be known as the NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, whereby it is agreed—

"That in consideration of the mutual agreements, covenants and provisions herein contained, the parties hereto do by these presents merge and consolidate the respective capital stocks, franchises, and properties of the aforesaid constituent companies into one corporation to be called and known as 'The New York, Chicago and St. Louis Railroad Company', which said consolidated corporation shall from henceforth have and possess all and singular the rights, franchises, powers, exemptions, immunities, privileges and capacities, which are or have been granted to or conferred upon, or possessed or enjoyed by the said constituent companies.

"And this agreement further witnesseth, that the parties hereto have agreed upon and by these presents do agree upon and prescribe the following as the terms and conditions of this agreement and articles of consolidation, which terms and conditions the parties hereto mutually promise and agree to observe, keep and perform, viz.:"

[fol. 39] Articles I to XII, inc.

Provide for the name of the consolidated corporation, its principal office, directors and officers, by-laws, meetings, issuance of stock, rights of stockholders to share in the assets and earnings of corporation, and powers.

Article XIII

"Such merger and consolidation shall take effect and the said consolidated corporation shall go into operation when and so soon as this agreement and articles of consolidation shall have been duly executed and shall have been adopted by the stockholders of the respective constituent companies in the manner prescribed by law and the fact of such adoption shall have been certified hereupon by the secretaries of said constituent companies under the seals thereof as required by law, and this agreement so adopted and so certified, or a copy thereof, shall have been filed in the offices of the secretaries of state of the States of Illinois, Indiana, New York, Ohio and Pennsylvania, and, if required, in the office of the recorder of the various counties of the State of Illinois, in which the lines of the constituent railroads are situated, and in the office of the clerk of Erie County, New York, and thereupon and thereafter all the railroads, estates and property, real, personal and mixed, and all fixtures, rights, privileges, franchises, easements, terms and parts of terms, agreements, covenants, contracts, tariffs and obligations, and all property of every description, name and nature, held, owned, or occupied by or belonging to the constituent companies aforesaid, or any of them, shall be and become and be vested in and be thereafter owned, used and enjoyed by said consolidated corporation, without any further deed, transfer or conveyance and as fully and effectually to all intents and purposes as the same are now held by each of the said constituent companies respectively. And the board of directors of said consolidated corporation shall have full power to carry said merger and consolidation into effect by all acts necessary or proper for such purpose.

"The foregoing enumeration shall not be deemed to [fol. 40] exclude any other effects, rights or privileges provided by law as incident to or resulting from any such consolidation and not herein specifically mentioned."

Article XIV

The existence of the consolidated corporation shall be perpetual.

[fol. 41] In Municipal Court of City of New York

Affidavit in Support of Cross-Motion for Summary Judgment

State of ——,
County of ——, ss.:

H. F. Lohmeyer, being first duly sworn, deposes and says:

I am the Secretary and the Treasurer of The New York, Chicago and St. Louis Railroad Company, the defendant in the above-entitled action, and make this affidavit in support of its cross motion therein for summary judgment and in opposition to the plaintiff's motion for summary judgment.

The defendant was formed by the consolidation, perfected April 11, 1923, of the former The New York, Chicago and St. Louis Railroad Company, The Chicago and State Line Railroad Company, The Lake Erie and Western Railroad Company, Fort Wayne, Cincinnati and Louisville Railroad Company, and Toledo, St. Louis and Western Railroad Company, by and pursuant to an Agreement and Articles of Consolidation made and entered into the 28th day of December, 1922, between those companies and their respective boards of directors and under and in accordance with the respective laws of the several States of New York, Pennsylvania, Ohio, Indiana and Illinois.

As the Secretary of the defendant, I have possession and custody of all of its books and other records relating [fol. 42] to each and every meeting of its stockholders, of its Board of Directors, and of the Executive Committee of said Board, including the official minutes of each such meeting; together with similar records of each of said consolidating companies, containing the official minutes of each meeting of its stockholders, of its Board of Directors, and of the Executive Committee of said Board at which any action with reference to said consolidation was taken. If there had ever been any corporate authorization of any application by said consolidating companies, or any of them, or by the defendant to the Interstate Commerce Commission, pursuant to Section 5 of the Interstate Commerce Act, for approval of said consolidation, or any corporate authorization of any application by or on behalf of the defendant to said Commission, pursuant to Section 20a of

that Act, for authority for the assumption by the defendant of any obligation or liability as lessor, lessee, guarantor, endorser, surety or otherwise in respect of any bonds or bond of The Northern Ohio Railway Company, or any corporate authorization of any such assumption, the fact of such corporate authorization would have been recorded in said books or records of one or more of said consolidating companies or of the defendant. There is in none of them any record of any corporate authorization of any such assumption or of any such application, either for approval of said consolidation or for authority for any such assump-[fol. 43] tion by the defendant. At the time of and ever since said consolidation, the rules and regulations of said Commission required and have required such corporate authorization in the case of every application for such authority.

I am accordingly in a position to state and do state that said consolidation never has been approved by the Interstate Commerce Commission, pursuant to Section 5 of the Interstate Commerce Act; that no application for such approval has ever been made to said Commission; that the defendant has never been authorized by said Commission, pursuant to Section 20a of said Act, to assume any obligation or liability whatever in respect of any bonds or bond of The Northern Ohio Railway Company; that the defendant has never applied to said Commission for any such authority; and that the defendant has never expressly assumed any such obligation or liability.

I believe that there is no merit to this action.

Wherefore, it is prayed that this Court make and enter herein an order denying the plaintiff's motion for summary judgment and granting defendant's motion for summary judgment dismissing the complaint herein with costs of this motion and of this action.

H. F. Lohmeyer.

Verified January 19, 1940.

[fol. 44] In Municipal Court of City of New York

Hon. Thomas J. Whalen, Justice

House, Grossman, Vorhaus & Hemley, Esqs., 521 Fifth Avenue, New York, N. Y., Attorneys for the Plaintiff.

Donovan, Leisure, Newton & Lumbard, Esqs., 2 Wall Street, New York, N. Y., Attorneys for the Defendant.

Opinion—March 15, 1940

Whalen, J.:

Plaintiff moves for summary judgment in an action upon interest coupons attached to bonds issued by the Northern Ohio Railway Company under date of October 1, 1895, bearing the guaranty of punctual payment endorsed thereon by The Lake Erie & Western Railroad Company. There are five causes of action based upon five separate coupons, maturing April 1, 1939, in the sum of $25 each, and unpaid. The defendant is a consolidated corporation organized April 11, 1923, pursuant to the statutes of New York, Pennsylvania, Ohio, Indiana and Illinois, and is being sued as a New York corporation. The Lake Erie & Western Railroad Company was an Illinois corporation and was one of the constituents of the consolidated corporation.

[fol. 45] Section 143 of the Railroad Law of the State of New York, pursuant to which the consolidation was effected, provides that the debts and liabilities of the several consolidating corporations shall attach to and become liabilities of the consolidated corporation. Hence this suit against this defendant.

Defendant interposes two defenses:

1) That the guaranty given by The Lake Erie & Western was ultra vires and wholly void.

2) That the defendant, an interstate carrier, was never authorized by the Interstate Commerce Commission to assume the guaranty as required by Section 20(a) of the Interstate Commerce Act, and that without that authorization there can be no liability inasmuch as any such assumption of liability is illegal and void.

In its brief defendant does not question the sufficiency of the affidavits presented on plaintiff's affirmative case.

In support of its defense of ultra vires defendant presents voluminous affidavits and exhibits from the records of the

corporations directly involved which, it is claimed, raise at least an issue of fact as to the power of The Lake Erie & Western to guarantee payment of the bonds and coupons [fol. 46] of the Northern Ohio, and consequently require a denial of the motion.

Briefly summarized, defendant presents the following facts respecting the history and relationships of defendant, The Lake Erie & Western and the Northern Ohio:

The Lake Erie & Western was an Illinois corporation organized February 10, 1887.

The Pittsburgh, Akron & Western Railway Company was an Ohio corporation operating a line of railway in the State of Ohio. In 1894, having defaulted in payment of interest on its first mortgage bonds, a proceeding was brought to foreclose the mortgage and a decree of foreclosure was entered, May 23, 1894.

On October 8, 1894, at a director's meeting of The Lake Erie & Western, the President, Calvin S. Brice, was authorized to acquire the railway if he could do so within certain limited terms. He thereafter conducted negotiations through a corporation controlled by him, called the Central Contract & Finance Co., with a Committee representing the bondholders on the defaulted bonds of the P. A. & W. leading to an agreement whereby The Lake Erie & Western, instead of purchasing the railway outright, arranged to organize a new corporation to which title would pass and then have The Lake Erie & Western lease the line railway perpetually [fol. 47] and pay as rental the net proceeds of the line to the lessor and also to guarantee payment of principal and interest of bonds to be issued by the new corporation. This was later done except that the line was leased for 999 years instead of perpetually. A new corporation, the Northern Ohio Railway Co. was organized under the laws of the State of Illinois. The Northern Ohio issued bonds in the amount of $2,500,000, secured by a first mortgage on its line and The Lake Erie & Western arranged with a syndicate of bankers, headed by Vermilye & Co., to sell the bonds with the guaranty of The Lake Erie & Western endorsed thereon. From the records it appears that this guaranty was a very important, if not the principal, consideration for the purchase of the bonds.

A lease was given by the Northern Ohio to The Lake Erie & Western, of all its properties for 999 years. All these proceedings were approved and thereafter ratified

by the Boards of Directors and stockholders of both corporations, the active agent at all times being Calvin S. Brice, the President of The Lake Erie & Western.

While all these various steps took time and were accomplished on various dates, the effective date of the whole operation including the bonds, mortgage and lease, was October 1, 1895. Thereafter, until 1919, the line of rail [fol. 48] way owned by the Northern Ohio was operated under the lease by The Lake Erie & Western.

As to the defense of ultra vires, defendant cites the general principle, to the effect that a corporation, unless authorized by its charter or the statutes of the state of its organization, is without authority to guarantee the bonds or debts of any other corporation. This rule is expressed in the following excerpt from Louisville, (etc.) Ry. Co. vs. Louisville Trust Co., 174 U. S. 552 (1898):

"A railroad corporation unless authorized by its act of incorporation or by other statutes to do so, has no power to guarantee the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly ultra vires, unlawful and void, and incapable of being made good by ratification or estoppel."

However, there are exceptions to this general rule and in the opinion in the same case, at page 573, appears the following:

"One who takes from a railroad or business corporation in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary, in the name and under the seal of the corporation and disclosing upon its face, no want of authority, has the right to [fol. 49] assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation."

These bonds and their interest coupons, payable to bearer, are negotiable instruments.

Evertson vs. National Bank of Newport, 66 N. Y. 15.

There is no reason shown here to doubt that plaintiff is a bona fide purchaser for value without notice of any defect in these bonds or coupons.

The Lake Erie & Western was an Illinois corporation organized in 1887. It was not expressly authorized either in its Articles of Incorporation or by any general statute of Illinois to guarantee the obligations of any other person, natural or artificial. The power, if it had any, to make the guaranty must be found in the implied powers of the corporation. A corporation has implied powers to do all things necessary or incidental to the exercise of the powers expressly granted.

Calumet etc. Dock Co. vs. Conkling, 273 Ill. 318-322.

Under the statutes of Illinois (Act of February 12, 1855; Laws 1855, p. 304) a railroad corporation of that State had [fol. 50] power to enter into leases with other railroad corporations:

Pennsylvania R. R. Co. vs. St. Louis, Alton & Terre Haute Railroad Company, 118 U. S. 290 (1885).

It has been held that if a railroad corporation has power to take a lease of the lines of another corporation it has power to make agreements appropriate to such a transaction, such as payment of rent and guaranteeing payment of bonds of the lessor.

6 Fletcher Cyc. Corp., Sec. 2719, p. 574.

Eastern Townships Bank vs. St. Johnsbury & L. C. R. Co., 40 Fed. 423, writ of error dismissed 149 U. S. 772.

When a railroad corporation has possession of bonds of another railroad corperation it has power to endorse its guaranty thereon for the purpose of sale.

Railroad Co. vs. Howard, 7 Wall 392 (1868).

Arnot vs. Erie Railway Co., 67 N. Y. 315 (1876).

When the guarantor is in reality the principal and the ostensible obligor on the bonds is in reality the creature [fol. 51] of the guarantor the guarantee will be valid.

Lake St. El. R. R. Co. vs. Carmichael, 184 Ill. 348 (1900).

It seems to me that this case comes within all of these exceptions to the general rule.

The guaranty was not executed for the accommodation of the Northern Ohio, but the entire transaction was a device engineered by The Lake Erie & Western for its own accom-

modation, in order to enable it to acquire control of the line of the old P. A. & W. so as to extend The Lake Erie & Western lines eastward.

Calvin S. Brice gave the instructions to a firm of attorneys for the organization of the Northern Ohio, for the preparation of the bond and mortgage and for the preparation of the lease. The Lake Erie & Western was the principal in the same way as the railroad was the principal in the Carmichael case.

Defendant claims The Lake Erie & Western never had actual possession of the bonds but they constructively passed through the hands of its secretary when he authorized delivery to Vermilye & Co., and in any event the question is not what was actually done but what The Lake Erie & Western had power to do so far as an innocent purchaser for value is concerned.

[fol. 52] Louisville (etc.) Ry. Co. vs. Louisville Trust Co., (supra)

The information about this was not a matter of public record and defendant would be estopped from setting up any mere irregularity as against this defendant. (Idem p. 575.)

The Lake Erie & Western had express power under the Illinois statute to enter into a lease arrangement with another railroad and it had implied power to make such terms as were necessary to carry out the lease.

In the case of Eastern Townships Bank vs. St. Johnsbury & L. C. R. Co. (supra) it was held that a lessee railroad corporation had power to guarantee payment of the bonds of its lessor, in view of a state statute authorizing one railroad corporation to lease the lines of another. The Vermont statute (R. L. Vt. Sec. 3303) is similar to the Illinois statute (L. 1855, p. 304, R.S. 1874, p. 807).

The cases of ultra vires cited by defendant are all cases where the transactions were held to be ultra vires because they were not made in furtherance of the purposes for which the corporations were organized, or because they were made in direct violation of a statute, such as the statutes of Illinois relating to the acquisition of land by a [fol. 53] corporation. No Illinois statute has been cited prohibiting a railroad corporation from guaranteeing bonds in any case and under any circumstances. Defendant has

cited no case which pushes the doctrine of ultra vires to the extent urged in this case.

In support of its second defense, defendant cites Section 20 (a) of the Interstate Commerce Act, and submits affidavits showing that no application was ever made to, or authorization ever granted by, the Interstate Commerce Commission to the assumption by defendant of liability on the guaranty in question.

Defendant urges this as a conclusive bar to the action and because the facts are not disputed makes a cross motion for summary judgment in its favor.

Section 143 of the Railroad Law of the State of New York provides that in case of consolidation "all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation."

Section 20 (a) of the Interstate Commerce Act, as amended by the Transportation Act of 1920, provides that it shall be unlawful for any carrier to issue or assume any liability in respect of the securities of any other person, [fol. 54] natural or artificial, unless the Interstate Commerce Commission authorizes such assumption.

Defendant claims that Section 20 (a) supersedes Section 143 of the New York Railroad Law and, inasmuch as no authorization has been obtained, the consequence is defendant has assumed no liability as guarantor of the Northern Ohio bonds.

Again defendant cites no cases directly in point. It claims that

> Missouri-Kansas Texas R. Co. of Texas v. Mars, 294 S. W. 941 (Texas Civil Appeals 1927)

is in point, but that case was reversed by the Texas Commission of Appeals (298 S.W. 271, 1927), and the reversal was affirmed by the United States Supreme Court (278 U.S. 258) on the ground that securities were not involved in the case.

It seems to me that the dispute here revolves around the meaning to be given to the word "assume" as used in Section 20 (a) of the Interstate Commerce Act. If that means something different than the liability imposed by Section 143 of the Railroad Law of the State of New York, the two statutes may be reconciled and there is no conflict between them. If they do have the same meaning, then

undoubtedly the Commerce Act controls because it is the supreme law of the land.

[fol. 55] The word "assume" connotes a voluntary action and is directly applicable to leases where a lessee railroad attempts to assume liability on the debt of its lessor. This happened in

> New York Central Securities Corp. v. U. S., 54 Fed. (2d) 122, S.D. N.Y., 1931, aff'd. 287 U.S. 12 (1932)

Words & Phrases, Fifth Series, Vol. 1, p. 592, defines the word "assume" as "to take upon oneself."

The word "assume" does not appear in Section 143 of the Railroad Law. Defendant argues as though it does. Instead the word "attach" appears. At the moment of consolidation the defendant did not "assume" the debts of The Lake Erie & Western. Instead, these debts immediately became its own debts. It required a direct liability of its own. It did not at that moment guarantee any debt of The Lake Erie and Western, but, rather, became liable on its own debt which attached by reason of the statute. It did not assume an "obligation" of any other person, natural or artificial.

No instance has been cited to me of any application to the Interstate Commerce Commission by a consolidated corporation to assume the debts of the constituent corporations, and I think the reason may be found in the fact that the Interstate Commerce Commission has not yet assumed [fol. 56] jurisdiction over the subject of consolidation under Section 5 of the Interstate Commerce Act, but has left these proceedings entirely to the jurisdiction of the States.

> Snyder v. New York, Chicago & St. Louis R. Co., 278 U.S. 578.
>
> Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company, 71 I.C.C. 581.

Therefore, no approval was sought of the Commission for the consolidation and none was necessary.

The Commission did, however, issue a certificate of convenience and necessity and must have done so with knowledge of the incidents of the consolidation under State law, including the attaching of the liabilities of the constituent corporations to the consolidating corporation.

The complaint, it seems to me, falls into the same error in the use of the word "assume" in the fifth paragraph. However, as that is a conclusion of law, it may be disregarded as surplussage, inasmuch as the other allegations of the paragraph (if we accept the word "merger" as meaning "consolidation") state the essential facts for a cause of action.

My conclusion is that it was not necessary for the defendant to make an application to the Interstate Commerce Commission or to receive its authorization under Section [fol. 57] 20 (a) before becoming liable on The Lake Erie & Western guaranty of the Northern Ohio bonds.

It follows that defendant's motion for summary judgment must be denied, and plaintiff's motion will be granted.

[fol. 58] In Municipal Court of City of New York

Order Granting Plaintiff's Motion for Summary Judgment

Hon. Thomas J. Whalen, Justice.

The following papers numbered 1 to 9 and A to Y read on this motion for summary judgment in favor of the plaintiff this 24th day of January 1940.

	Papers Numbered
Notice of Motion and Affidavits Annexed	1, 2
Answering Affidavits on cross-motion	1-7
Exhibits	A-Y inc.
Copies Papers Pleadings	3
Stipulations	5, 6, 7, 8, 9
Deft. Notice	4

Upon the foregoing papers this motion is granted. Execution stayed for 5 days after service of a copy of this order with notice of entry.

See Opinion.

Dated New York City, March 18, 1940.

Enter.

T. J. W. J. M. C.

[fol. 59] In Municipal Court of City of New York

Order Denying Defendant's Cross Motion for Summary Judgment

Hon. Thomas J. Whalen, Justice.

The following papers numbered 1 to 7 & A to Y read on this motion dismiss the complaint this 24th day of January, 1940.

	Papers Numbered
Notice of Motion and Affidavits Annexed	1 to 7
Exhibits	A to Y inc.

Upon the foregoing papers this motion is denied.
See memo on plaintiff's cross-motion.
Dated Mar. 18, 1940.
Enter.

T. J. W. J. M. C.

[fol. 60] In Municipal Court of City of New York

Judgment

Amount awarded after Motion for Summary Judgment		$125.00
Interest		7.20
Total		$132.20
Costs by Statute	$7.50	
Service of summons and complaint	1.50	
Filing of summons and complaint	2.00	
Prospective Marshal's Fee	1.00	12.00
Total		$144.20

State of New York,
City of New York,
County of New York, ss:

Morris L. Wolf, being duly sworn, deposes and says: That I am an attorney in the office of House, Grossman, Vorhaus & Hemley, the attorneys for the plaintiff herein. That the disbursements above specified have been made in the said action or will necessarily be made or incurred

therein. That a decision has been made and rendered by Hon. Thomas J. Whalen, one of the Justices of this Court by order dated March 18th, 1940, and entered in the office of the Clerk of this Court on the 19th day of March, 1940, awarding the plaintiff summary judgment against the de-
[fol. 61] fendant, as demanded in the complaint.

Morris L. Wolf.

Verified March 19, 1940.

Judgment entered the 20th day of March, 1940.

The summons and complaint in this action having been personally served on the defendant and the defendant having appeared and answered by its attorneys, Donovan, Leisure, Newton & Lumbard, and the plaintiff having moved by notice of motion for summary judgment for the relief demanded in the complaint, and the said motion having been granted by order of Mr. Justice Whalen dated the 18th day of March, 1940, and filed in the office of the Clerk of this Court on March 19th, 1940.

Now, on Motion of House, Grossman, Vorhaus & Hemley, attorneys for the plaintiff, it is

Adjudged, that Dorothea T. Frank, the plaintiff, recover of New York, Chicago & St. Louis Railroad Company, the defendant, the sum of $125.00, with interest of $7.20, making a total of $132.20, together with $12.00 costs and disbursements, amounting in all to the sum of $144.20, and that the plaintiff have execution therefor.

March 20, 1940.

Five (5) days stay of execution.

George J. McMahon, Clerk.

[fol. 62] In Municipal Court of City of New York

Amended Notice of Appeal

Sirs:

Please Take Notice that the New York, Chicago and St. Louis Railroad Company, the defendant in the above entitled action, hereby appeals to the Appellate Term of the Supreme Court, First Judicial Department, from the judgment entered herein, in the office of the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, on the 20th day of March, 1940, in

favor of the plaintiff, and against said defendant, and for the sum of $144.20, and from the whole of said judgment, and each and every part thereof.

Please Take Further Notice that the appellant intends to bring up for review on such appeal the orders made and entered herein on the 19th day of March, 1940, granting the plaintiff's motion for summary judgment herein and denying the defendant's cross motion for summary judgment herein.

Dated: New York, N. Y., March 23rd, 1940.

[fol. 63] Yours, etc., Donovan, Leisure, Newton & Lumbard, Attorneys for Defendant, Office and Post Office Address, No. 2 Wall Street, Borough of Manhattan, New York, N. Y.

To: House, Grossman, Vorhaus & Henley, Attorneys for Plaintiff, Office and Post Office Address: No. 521 Fifth Avenue, Borough of Manhattan, New York, N. Y.

George J. McMahon, Esq., Clerk of Municipal Court, Borough of Manhattan, Ninth District, 624 Madison Avenue, New York, N. Y.

[fol. 64] In Supreme Court of New York, Appellate Term—First Department

Dorothea T. Frank, Plaintiff-Respondent,

against

New York, Chicago & St. Louis Railroad Company, Defendant-Appellant

Stipulation

It is hereby stipulated, consented and agreed, by and between the undersigned that Exhibit "A", attached to the affidavit of C. C. Collister herein, being the Agreement and Articles of Consolidation of the New York, Chicago & St. Louis Railroad Company, dated December 28, 1922, need not be printed or reproduced in the case and record on appeal or any other or subsequent appeal which may be taken by either of the parties herein, but that said exhibit shall be deemed a part of said case and record as fully and with the same force and effect as if reproduced therein in

full; and that such exhibit may be referred to in the briefs and referred to and handed up to the Court on the argument of said appeal by either party hereto; and that in said case and record on appeal in place of the reproduction of said exhibit may be substituted the following summary thereof:

[fol. 65] ATTACHED TO THE AFFIDAVIT OF C. C. COLLISTER, AS EXHIBIT "A"

is the

AGREEMENT AND ARTICLES OF CONSOLIDATION

dated

December 28, 1922

between

THE NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, THE CHICAGO AND STATE LINE RAILROAD COMPANY, THE LAKE ERIE AND WESTERN RAILROAD COMPANY, FORT WAYNE, CINCINNATI AND LOUISVILLE RAILROAD COMPANY, and TOLEDO, ST. LOUIS AND WESTERN RAILROAD COMPANY for the consolidation of said companies into one company to be known as the NEW YORK, CHICAGO AND ST. LOUIS RAILROAD COMPANY, whereby it is agreed—

"That in consideration of the mutual agreements, covenants and provisions herein contained, the parties hereto do by these presents merge and consolidate the respective capital stocks, franchises, and properties of the aforesaid constituent companies into one corporation to be called and known as 'The New York, Chicago and St. Louis Railroad Company' which said consolidated corporation shall from henceforth have and possess all and singular the rights, franchises, powers, exemptions, immunities, privileges and capacities, which are or have been granted to or conferred upon, or possessed or enjoyed by the said constituent companies.

"And this agreement further witnesseth, that the parties hereto have agreed upon and by these presents do agree upon and prescribe the following as the terms and conditions of this agreement and articles of consolidation, which terms and conditions the parties hereto mutually promise and agree to observe, keep and perform, viz:"

[fol. 66] Articles I to XII, inc.

Provide for the name of the consolidated corporation, its principal office, directors and officers, by-laws, meetings, issuance of stock, rights of stockholders to share in the assets and earnings of corporation, and powers.

Article XIII

"Such merger and consolidation shall take effect and the said consolidated corporation shall go into operation when and as soon as this agreement and articles of consolidation shall have been duly executed and shall have been adopted by the stockholders of the respective constituent companies in the manner prescribed by law and the fact of such adoption shall have been certified hereupon by the secretaries of said constituent companies under the seals thereof as required by law, and this agreement so adopted and so certified, or a copy thereof, shall have been filed in the offices of the secretaries of state of the States of Illinois, Indiana, New York, Ohio and Pennsylvania, and, if required, in the office of the recorder of the various counties of the State of Illinois, in which the lines of the constituent railroads are situated, and in the office of the clerk of Erie County, New York, and thereupon and thereafter all the railroads, estates and property, real, personal and mixed, and all fixtures, rights, privileges, franchises, easements, terms and parts of terms, agreements, covenants, contracts, tariffs and obligations, and all property of every description, name and nature, held, owned, or occupied by or belonging to the constituent companies aforesaid, or any of them, shall be and become and be vested in and be thereafter owned, used and enjoyed by said consolidated corporation, without any further deed, transfer or conveyance and as fully and effectually to all intents and purposes as the same are now held by each of the said constituent companies respectively. And the board of directors of said consolidated corporation shall have full power to carry said merger and consolidation into effect by all acts necessary or proper for such purpose.

"The foregoing enumeration shall not be deemed to [fol. 67] exclude any other effects, rights or privileges provided by law as incident to or resulting from any such consolidation and not herein specifically mentioned."

Article XIV

The existence of the consolidated corporation shall be perpetual.

Dated: New York, N. Y., April 22, 1940.

House, Grossman, Vorhaus & Henley, Attorneys for Plaintiff-Respondent.

Donovan, Leisure, Newton & Lumbard, Attorneys for Defendant-Appellant.

[fol. 68] In Supreme Court of New York, Appellate Term—First Department

Present: Hon. Ernest E. L. Hammer, Hon. Bernard L. Shientag, Hon. Julius Miller, Justices.

12590—40 #75 MC June

Dorothea T. Frank, Plaintiff-Respondent,

vs.

New York, Chicago & St. Louis Railroad Company, Defendant-Appellant

Judgment—Filed June 28, 1940

An appeal having been taken to this Court by defendant from judgment of the Municipal Court of the City of New York, Borough of Manhattan, 9th Dist., entered on the 20th day of March, 1940, and orders entered on the 19th day of March, 1940, and the said appeal having been heard and due deliberation having been had thereon,

It is ordered and adjudged that the judgment and orders [fol. 69] so appealed from be and the same are hereby affirmed, with $25 costs.

Enter.

E. E. L. H., Justice Appellate Term, Supreme Court, First Dept.

[File endorsement omitted.]

[fol. 70] In Municipal Court of City of New York

Present: Hon. Lester Lazarus, Justice.

Clerk's Index No. 8547—1939

Dorothea T. Frank, Plaintiff-Respondent,

against

New York, Chicago & St. Louis Railroad Company, Defendant-Appellant

Order Adopting Judgment of Appellate Term—July 3, 1940

On reading and filing the annexed affidavit of Morris L. Wolf, sworn to the 3rd day of July, 1940, and on reading the order of the Appellate Term, First Department, dated June 28th, 1940, a copy of which is annexed hereto, it is, on motion of House, Grossman, Vorhaus & Hemley, attorneys for the plaintiff herein,

Ordered, that the said order of the Appellate Term [fol. 71] affirming the judgment and orders appealed from with Twenty-Five ($25) Dollars costs, be, and the same hereby is, made the order of this Court, and the Clerk is directed to enter judgment accordingly.

Enter.

L. L., J. M. C.

Filed July 5, 1940.

[fol. 72] In Municipal Court of the City of New York, Borough of Manhattan

Ninth District

Clerk's Index No. 8547-1939

Dorothea T. Frank, Plaintiff,

against

New York, Chicago & St. Louis Railroad Company, Defendant.

Judgment on Affirmance—Filed July 5, 1940

The above-named defendant having appealed to the Appellate Term of the Supreme Court, First Department,

from a judgment of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, entered on the 20th day of March, 1940, and also from the orders made and entered therein on the 19th day of March, 1940, and the said appeal having been duly heard and due deliberation having been had thereon, and the said Appellate Term having by its order dated June 28th, 1940, ordered and adjudged that the judgment and orders so appealed from be affirmed with $25.00 costs, and said order having been duly filed in the office of the Clerk of the County of New York, on June 28th, 1940, and a certified copy thereof, together with the Remittitur, having been filed in the office of the Clerk [fol. 73] of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, on the 2nd day of July, 1940, and an order dated July 3rd, 1940 having been duly made and entered herein, making the said order of the Appellate Term the Order of this Court and directing the Clerk to enter judgment accordingly, and the costs of the appeal having been duly taxed by the Clerk, it is

Now On Motion of House, Grossman, Vorhaus & Hemley, attorneys for plaintiff Dorothea T. Frank,

Adjudged, that the judgment and orders so appealed from be and the same are hereby in all things affirmed, and it is further

Adjudged, that Dorothea T. Frank do recover of the New York, Chicago & St. Louis Railroad Company, the sum of Twenty Six and 00 100 ($26.00) Dollars, costs and disbursements, and that the plaintiff have execution therefor.

Dated, N. Y. July 5, 1940.

George J. McMahon, Clerk.

[fol. 74] In Supreme Court of New York

Appellate Term

(Title Omitted)

Order Denying Leave to Appeal—Filed August 12, 1940

The above named defendant having moved for leave to appeal to the Appellate Division from the determination of the Appellate Term herein

Now upon reading and filing order to show cause, dated July 8, 1940 and the affidavit of David Teitelbaum verified the 3rd day of July 1940 in favor of said motion, and the affidavit of Louis J. Vorhaus verified the 9th day of July, 1940 in opposition thereto,

It Is Ordered that said motion be and the same hereby [fol. 75] is denied, with $10 costs, and stay vacated.

Enter.

E. E. L. H. Justice, Appellate Term, Supreme Court, First Dept.

[File endorsement omitted.]

[fol. 76] In Supreme Court of New York

Appellate Division

Present: Hon. Francis Martin, Presiding Justice, Hon. James O'Malley, Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Irwin Untermyer, Justices.

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Order on Application for Leave to Appeal From Appellate Term

Dorothea T. Frank, Respt.,

vs.

New York, Chicago & St. Louis Railroad Company, Applt.

Order Denying Leave to Appeal—October 9, 1940

An application having been made by the defendant to the Appellate Division of the First Judicial Department for leave to appeal to the Appellate Division from the determination of the Appellate Term of the Supreme Court in this action entered in the office of the Clerk of the Supreme Court on the 28th day of June, 1940, for a consolidation of the appeal for which leave is sought with the appeal in the case of Lawrence H. Friedman vs. The New York, Chicago and St. Louis Railroad Company, and for a stay pending said appeal, and the said application having come on [fol. 77] to be heard, on reading and filing the notice of

application herein, dated August 13, 1940, and the affidavits of David Teitelbaum and John H. Agate in support of said application, and the affidavit of Joseph Fischer in opposition thereto and the affidavit of Irving D. Friedman and after hearing Mr. David Teitelbaum for the application, and Mr. Joseph Fischer opposed,

It is ordered that said application be and the same hereby is denied with $10 costs, and that the stay contained in the order to show cause herein, dated August 13, be and the same hereby is vacated.

Enter.

[fol. 78] SUPREME COURT OF THE UNITED STATES

[Title omitted]

NOTICE AND ACKNOWLEDGMENT OF SERVICE

SIRS:

Please Take Notice that attached hereto are true copies of the following papers, which are herewith served upon you:

1. Petition for and order allowing appeal.
2. Assignments of error.
3. Statement showing jurisdiction of Supreme Court of the United States.
4. Citation.
5. Statement directing attention to the provisions of paragraph 3 of Rule 12 of the Supreme Court of the United States.
6. Supersedeas bond.

Yours, etc. William J. Donovan, Counsel for Appellant, 2 Wall Street, Borough of Manhattan, City of New York.

[fol. 79] To: Messrs. House, Grossman, Vorhaus & Henley, 521 Fifth Ave., Manhattan, New York, N. Y., Counsel for Appellee.

Service upon the undersigned of the foregoing list of papers is hereby acknowledged this 11th day of October, 1940.

(sgd) House, Grossman, Vorhaus & Hemley, Counsel for Appellee.

[fol. 80] SUPREME COURT OF THE UNITED STATES

Petition for Appeal, Assignment of Errors, and Prayer for Reversal

PETITION FOR APPEAL

Considering itself aggrieved by the final judgment of the Appellate Term of the Supreme Court of the State of New York, First Department, in the above-entitled cause, the defendant, New York, Chicago & St. Louis Railroad Company, hereby prays that an appeal be allowed to the Supreme Court of the United States, herein, and for an order granting supersedeas fixing the amount of the required bond.

ASSIGNMENT OF ERRORS

And said defendant, New York, Chicago & St. Louis Railroad Company assigns the following errors in the record and proceedings in the said case:

First. The Court erred in holding that Section 143 of the Railroad Law of the State of New York, as applied to the facts of this case, is not repugnant to Section 20a of the Federal Interstate Commerce Act (U. S. C., Title 49, Section 20a, 41 Stat. 494).

Second. The Court erred in holding that Section 143 of the New York Railroad Law, as applied to the facts of this [fols. 81-104] case is not in conflict with Section 20a of the Interstate Commerce Act. (U. S. C., Title 49, Section 20a, 41 Stat. 494).

Third. The Court erred in holding that Section 20a of the Interstate Commerce Act (U. S. C., Title 49, Section 20a, 41 Stat. 494), did not forbid the imposition by Section 143 of the New York Railroad Law, upon interstate carriers consolidated under the laws of New York, of obligations in respect of the securities of their constituent companies.

Fourth. The Court erred in holding that Section 20a of the Interstate Commerce Act (U. S. C., Title 49, Section 20a, 41 Stat. 494), did not forbid the imposition by Section 143 of the New York Railroad Law, upon interstate carriers consolidated under the laws of New York, of obligations in respect of the securities of their constituent companies, the

assumption of which obligations had not been approved by order of the Interstate Commerce Commission as provided in said Section 20a.

Prayer for Reversal

For which errors the defendant, New York, Chicago & St. Louis Railroad Company prays that the said judgment of the Appellate Term of the Supreme Court of the State of New York, First Department, dated June 28, 1940, in the above-entitled cause, be reversed, and a judgment rendered in favor of the said defendant, and for costs.

Dated, October 10th, 1940.

(Sgd.) William J. Donovan, Counsel for Appellant.

[fol. 105] Supreme Court of the United States

Order Allowing Appeal

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Appellate Term of the Supreme Court of the State of New York, First Department, on the 28th day of June, 1940, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It is now here Ordered that an appeal be, and the same hereby is, allowed to the Supreme Court of the United States from the Appellate Term of the Supreme Court of the State of New York, First Department, in the above entitled cause, as provided by law, and it is further Ordered that the clerk of the Appellate Term of the Supreme Court of the State of New York, First Department, shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within 40 days of this date.

[fol. 106] It is Further Ordered, that said Appellant shall file a bond in the penal sum of $1,000.00, with good and

sufficient surety, that he shall prosecute said appeal to effect and answer all damages and costs if he fail to make his plea good.

It is Further Ordered that upon giving the above-mentioned security, this appeal shall operate as a supersedeas, and that execution and other proceedings under the judgment appealed from shall be stayed, pending this appeal.

Dated: October 11, 1940.

(Sgd.) Harlan F. Stone, Associate Justice of the Supreme Court of the United States.

[fol. 107] Citation in usual form omitted in printing.

[fols. 108-121] Supersedeas bond on appeal for $1,000.00 approved, omitted in printing.

[fol. 122] In Supreme Court of New York, Appellate Term

Praecipe for Transcript of Record

To the Clerk of the County of New York and of the Supreme Court of the State of New York, Appellate Term, First Department:

You Are Hereby Requested to make a transcript of record to be filed in the Supreme Court of the United States pursuant to an appeal allowed in the above-entitled cause, and to include in such transcript of record the following and no other papers and exhibits, to wit:

1. Complaint, verified June 3, 1939.

2. Answer, verified July 31, 1939, excluding paragraphs Third, Fourth and Fifth, thereof.

3. Notice of Plaintiff's motion for summary judgment, dated December 30, 1939.

4. Affidavit of Dorothea T. Frank in support of plaintiff's motion for summary judgment, verified December 22, 1939, excluding the first two full paragraphs on page 14 of the original papers on appeal to the Appellate Term, and the first full paragraph on page 15 of said papers.

5. Admissions of defendant, dated November —, 1939, excluding Exhibit A thereto.

6. Notice of defendant's cross motion for summary judgment, dated January 20, 1940.

[fol. 123] 7. Affidavit of Theodore Sherwood Hope, Jr., in support of defendant's cross-motion for summary judgment, verified January 20, 1940, excluding the material beginning with the first full paragraph on page 51 of the original papers on appeal to the Appellate Term, and ending with the first full paragraph on page 62 of said papers, but including the second full paragraph on said page 62, constituting the prayer for relief.

8. Affidavit of C. C. Collister in support of defendant's cross-motion for summary judgment, verified January 19, 1940, including Exhibit A thereto.

9. First affidavit of H. F. Lohmeyer in support of defendant's cross-motion for summary judgment, verified January 19, 1940, and appearing on pages 68 to 71 of the original papers on appeal to the Appellate Term.

10. Opinion of Whalen, J., in the Municipal Court, excluding material beginning with the second full paragraph on page 293 of original papers on appeal to Appellate Term, and ending with the fourth line on page 301 of said papers.

11. Order of Municipal Court granting plaintiff's motion for summary judgment, made and entered March 18, 1940.

12. Order of Municipal Court denying defendant's motion for summary judgment, made and entered March 18, 1940.

13. Judgment of Municipal Court, made and entered March 20, 1940.

[fol. 124] 14. Notice of appeal to Appellate Term from judgment and orders of Municipal Court, dated March 23, 1940.

15. Stipulation, dated April 22, 1940, waiving complete reproduction in records upon subsequent appeals of Exhibit A to affidavit of C. C. Collister in support of defendant's cross-motion for summary judgment, verified January 19, 1940.

16. Judgment of Appellate Term, made and entered June 28, 1940, affirming judgment and orders of Municipal Court.

17. Order of Municipal Court, made and entered July 3, 1940, making order of Appellate Term the order of Municipal Court, and directing Municipal Court Clerk to enter judgment accordingly.

18. Judgment of Municipal Court, made and entered July 5, 1940.

19. Order of Appellate Term, made and entered August 12, 1940, denying leave to appeal to Appellate Division from judgment of Appellate Term.

20. Order of Appellate Division, made and entered October 9, 1940, denying leave to appeal to Appellate Division from judgment of Appellate Term.

21. Petition for appeal to the Supreme Court of the United States, assignment of errors and prayer for reversal, all dated October 10, 1940; order allowing appeal to [fol. 125] the Supreme Court of the United States, dated October 11, 1940; statement as to jurisdiction on appeal; citation dated October 11, 1940; statement under Rule 12 of the Rules of the Supreme Court of the United States, dated October 11, 1940; supersedeas bond, dated October 10, 1940; and acknowledgment of service of all these papers on October 11, 1940.

22. Appellee's statement against jurisdiction and motions to dismiss or affirm, and admission of service thereof on October 24, 1940.

23. This praecipe, dated October 31, 1940, and acknowledgment of service thereof.

Said transcript to be prepared as required by law and the Rules of the Supreme Court of the United States, and to be filed in the office of the Clerk of the Supreme Court of the United States on or before the 20th day of November, 1940.

Dated: October 31, 1940.

William J. Donovan, Counsel for Appellant.

Service of the above praecipe ~~accepted and~~ acknowledged this 1st day of November, 1940.

Louis J. Vorhaus, Counsel for Appellee.

[fol. 126] In Supreme Court of New York, Appellate Term, First Department

[Title omitted]

Order Directing Filing of Municipal Court Record in the Office of the Clerk of the Supreme Court.—Filed October 21, 1940

It appearing that the Honorable Harlan F. Stone, an Associate Justice of the Supreme Court of the United

States, has allowed an appeal to said Supreme Court from the judgment herein of the Appellate Term of the Supreme Court, First Department, dated the 28th day of June, 1940, and it appearing that said Honorable Harlan F. Stone has directed the Clerk of this Court to prepare and certify the transcript of the record, proceedings and judgment herein and to transmit the same to the Supreme Court of the United States so that said Clerk shall have the same in the Supreme Court of the United States on or before the 20th day of November, 1940.

Now, on reading and filing the annexed affidavit of David Teitelbaum, sworn to the 17th day of October, 1940, it is

On motion of Donovan, Leisure, Newton & Lumbard, attorneys for the defendant-appellant herein,

[fol. 127] Ordered, that the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, be and he hereby is directed to transmit to the clerk of the County of New York as the Clerk of the Supreme Court, New York County, the record, proceedings and judgment of this Court, on appeal hereto from the judgment of said Municipal Court herein, made and entered in said Municipal Court on the 20th day of March 1940, and from the orders made and entered therein on the 19th day of March, 1940, granting the plaintiff's motion for summary judgment and denying the defendant's cross-motion for summary judgment, all now on file in the office of the Clerk of said Municipal Court under file number 8547/1939, for filing with said Clerk of the County of New York, as aforesaid, so that a transcript of said record, proceedings and judgment, together with such other papers now on file with said Clerk of the County of New York, as aforesaid, as may be designated for that purpose, may be prepared and certified by said Clerk of the County of New York, as aforesaid, to the Supreme Court of the United States in accordance with the order of the Honorable Harlan F. Stone, as Associate Justice of the Supreme Court of the United States, dated the 11th day of October, 1940, and

It Is Further Ordered, that said Clerk of the County of New York be and he hereby is directed as Clerk of this [fol. 128] Court to file said record, proceedings and judgment in his office and, in accordance with the aforesaid order of the Honorable Harlan F. Stone, dated the 11th day of October, 1940, to prepare and certify to the Supreme Court of the United States, in accordance with the Statutes

of the United States and the Rules of the Supreme Court of the United States in such cases made and provided, a transcript of so much of the same as may hereafter be designated as provided in said Statutes and Rules, together with any other papers now on file in his office, which may be so designated.

October 21, 1940.

Ent. B. L. Shientag, Justice Appellate Term of the Supreme Court of the State of New York, First Department.

[File endorsement omitted.]

[fol. 129] In Supreme Court of New York, Appellate Term

Affidavit of David Teitelbaum

State of New York,
County of New York, ss:

David Teitelbaum, being duly sworn, deposes and says:

I am an attorney at law and a member of the firm of Donovan, Leisure, Newton & Lumbard, attorneys for the defendant-appellant herein, and am fully familiar with all the proceedings heretofore had herein.

I make this affidavit in application for an order directing the Clerk of the Municipal Court, City of New York, Borough of Manhattan, Ninth District, to file the record, proceedings and judgment of this Court in this action with the Clerk of the County of New York, so that certain portions thereof may be certified by the Clerk of the County of New York to the Supreme Court of the United States, pursuant to an order, hereinafter described, allowing an appeal to that Court.

This action was commenced in the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, by the service of a summons and complaint on or about the 20th day of July, 1939. On the filing of said summons and complaint with the Clerk of said Municipal Court, the action was given file number 8547/1939 by said Clerk.

[fol. 130] On or about the 19th day of March, 1940 two orders in the action were entered in said Municipal Court, one granting a motion by the plaintiff for summary judg-

ment and the other denying the defendant's cross-motion for summary judgment. Judgment against the defendant on the plaintiff's motion was entered in the office of the Clerk of said Municipal Court on or about the 20th day of March, 1940.

The defendant-appellant duly appealed to this Court from the judgment and orders entered in the Municipal Court, as aforesaid and said appeal duly came on to be heard by this Court, and on the 28th day of June, 1940 a judgment of this Court was made and entered affirming the judgment and orders appealed from.

Defendant-appellant thereupon duly applied to this Court for leave to appeal from the judgment of affirmance aforesaid to the Appellate Division of the Supreme Court, First Department. Said motion for leave to take such further appeal was denied by this Court on or about the 12th day of August, 1940. Following such denial, the defendant-appellant duly applied to said Appellate Division for such leave but the Appellate Division denied the motion on or about the 9th day of October, 1940.

Defendant-appellant, having thus exhausted its remedies by way of a review of the Municipal Court judgment and [fol. 131] orders in the Courts of this State, duly submitted a petition to the Honorable Harlan F. Stone, an Associate Justice of the Supreme Court of the United States, on October 11, 1940, for the allowance by said Supreme Court of an appeal from the aforesaid judgment of affirmance of this Court to said Supreme Court and upon said petition said Honorable Harlan F. Stone allowed said appeal.

Attached hereto and made a part hereof is a copy of the order of said Honorable Harlan F. Stone allowing the appeal from the judgment of this Court to the Supreme Court of the United States. All of the papers on the allowance of the appeal will be requisitioned for examination by this Court on this application.

The order allowing the appeal, among other things, directs the Clerk of this Court to prepare and certify a transcript of the record, proceedings and judgment of this Court in the action and to transmit them to the Supreme Court of the United States so that said Court shall have them within forty days of said 11th day of October, 1940, i. e. on or about the 20th day of November, 1940. I am informed and believe, however, that, pursuant to Section 163

of the Municipal Court Code, on the rendering of the aforesaid judgment of this Court, the Clerk hereof remitted said judgment to the Municipal Court of the City of New York, [fol. 132] Borough of Manhattan, Ninth District and returned to the Clerk of said Municipal Court all the papers on which the appeal to this Court was heard including the proceedings of this Court on the appeal hereto. I have been informed that in order that the transcript of the record, proceedings and judgment of this Court on the appeal hereto may be prepared and certified by the proper Clerk on behalf of this Court to the Supreme Court of the United States, in accordance with the said order of Honorable Harlan F. Stone, said record, proceedings and judgment should be filed in the office of the Clerk of the County of New York as Clerk of the Supreme Court, New York County, so that the latter Clerk may make the certification.

Under Rule 10 of the General Rules of the Supreme Court of the United States the Clerk of the Court from which the appeal is taken is required to certify not the entire record but only such portions thereof as shall be designated for incorporation in such transcript.

No previous or other application has been made for the relief applied for herein.

Wherefore, it is respectfully prayed that an order be made herein directing the Clerk of the Municipal Court, Borough of Manhattan, Ninth District, to transmit to the [fol. 133] Clerk of the County of New York, as aforesaid, the record, proceedings and judgment of this Court on appeal hereto from the aforesaid judgment and order of said Municipal Court, so that said Clerk of the County of New York may prepare and certify a transcript of said record, proceedings and judgment to said Supreme Court of the United States on the appeal to that Court; and, directing the Clerk of the County of New York as Clerk of this Court to prepare and certify to the Supreme Court of the United States the transcript of said record, proceedings and judgment.

David Teitelbaum.

Sworn to before me this 17th day of October, 1940.
John A. Morhous, Notary Public. (Notarial Seal.)

Notary Public, Nassau Co. No. 2066.
N. Y. Co. Clk's. No. 848, Reg. No. 2M524.
Commission expires March 30, 1942.

[fol. 134] SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL

The appellant in the above entitled suit, having prayed for the allowance of an appeal in this cause to the Supreme Court of the United States from the judgment made and entered in the above entitled suit by the Appellate Term of the Supreme Court of the State of New York, First Department, on the 28th day of June, 1940, and from each and every part thereof, and having presented and filed its petition for appeal, assignment of errors, prayer for reversal and statement as to jurisdiction, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided:

It is now here Ordered that an appeal be, and the same hereby is, allowed to the Supreme Court of the United States from the Appellate Term of the Supreme Court of [fol. 135] the State of New York, First Department, in the above entitled cause, as provided by law, and it is further Ordered that the clerk of the Appellate Term of the Supreme Court of the State of New York, First Department, shall prepare and certify a transcript of the record, proceedings and judgment in this cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within 40 days of this date.

It is Further Ordered, that said Appellant shall file a bond in the penal sum of $1,000.00, with good and sufficient surety, that he shall prosecute said appeal to effect and answer all damages and costs if he fail to make his plea good.

It is Further Ordered that upon giving the above-mentioned security, this appeal shall operate as a supersedeas, and that execution and other proceedings under the judgment appealed from shall be stayed, pending this appeal.

Dated: October 11, 1940.

Harlan F. Stone (Sgd.), Associate Justice of the Supreme Court of the United States.

[fol. 136] Supreme Court of the United States

[Title omitted]

Designation of Additional Portions of Record to be Included in Transcript

To the Clerk of the County of New York:

In making up the transcript of record to be filed in the Supreme Court of the United States in the above entitled cause, you will please include in such transcript of record the following additional portions of the record not requested by the appellant, viz:

1. Paragraphs Third, Fourth and Fifth of the Answer, verified July 31st, 1939.

2. That portion of the opinion of Whalen, J., in the Municipal Court, beginning with the second full paragraph on page 293 of the original papers on appeal to the Appel-
[fol. 137] late Term, and ending with the fourth line on page 301 of said papers

3. Order of Appellate Term, made and entered October 21st, 1940, directing the Clerk of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, to transmit to the Clerk of the County of New York the record, proceedings and judgment of said Appellate Term on appeal thereto from the judgment of said Municipal Court herein, made and entered in said Municipal Court on the 20th day of March, 1940, and from the orders made and entered therein on the 19th day of March, 1940.

4. Affidavit of David Teitelbaum, sworn to the 17th day of October, 1940, recited in said order of the Appellate Term, made and entered on the 21st day of October, 1940, excluding the material beginning with the words, "The pertinent provisions of said Rule 10 are", on page 3 of said affidavit, and ending with the end of the quotation from said Rule on page 4.

5. This designation of additional portions of the record, desired to be included, dated the 8th of November 1940, and acknowledgment of service thereof.

Dated: November 8th, 1940.

Louis J. Vorhaus, Counsel for Appellee.

[fol. 138] Service upon the undersigned of the above designation is hereby acknowledged this 8th day of November, 1940.

William J. Donovan, Counsel for Appellant.

[fol. 139] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 140] Supreme Court of the United States

Statement of Points to be Relied upon and Designation of Parts of the Record Unnecessary for the Consideration Thereof—Filed November 28, 1940

Comes now the appellant in the above entitled cause and informs the Court that it will rely upon the following points:

1. The Court below erred in holding that Section 143 of the Railroad Law of the State of New York, as applied to the facts of this case, is not repugnant to Section 20a of the Federal Interstate Commerce Act (U. S. C., Title 49, Section 20a, 41 Stat. 494).

2. The Court below erred in holding that Section 143 of the New York Railroad Law, as applied to the facts of this case is not in conflict with Section 20a of the Interstate Commerce Act (U. S. C., Title 49, Section 20a, 41 Stat. 494).

3. The Court below erred in holding that Section 20a of the Interstate Commerce Act (U. S. C., Title 49, Section 20a, 41 Stat. 494), did not forbid the imposition by Section 143 of the New York Railroad Law, upon interstate carriers consolidated under the laws of New York, of obligations in respect of the securities of their constituent companies.

[fol. 140a] 4. The Court below erred in holding that Section 20a of the Interstate Commerce Act (U. S. C. Title 49, Section 20a, 41 Stat. 494), did not forbid the imposition by Section 143 of the New York Railroad Law, upon interstate carriers consolidated under the laws of New York, of obligations in respect of the securities of their constituent companies, the assumption of which obligations had not been approved by order of the Interstate Commerce Commission as provided in said Section 20a.

And the appellant further states that the following parts of the record are unnecessary to a consideration of the points upon which it relies and which are set forth above:

1. Portion of answer setting forth first complete and separate defense, appearing on page 9a of the record.

2. Portion of opinion of Whalen, J., beginning with the words "Defendant interposes two defenses", on page 45 of the record, and ending with the sentence "Defendant has cited no case which pushes the doctrine of ultra vires to the extent urged in this case", on page 53 of the record; and beginning and ending with the same words on pages 92 and 100 of the record, respectively.

3. Order directing the filing of the Municipal Court record in the office of the Clerk of the Supreme Court of the State of New York, appearing on pages 126-128 of the record.

4. Affidavit of David Teitelbaum in application for order directing the filing of the Municipal Court record in the office of the Clerk of the Supreme Court of the State of New York, appearing at pages 129-133 of the record.

William J. Donovan, Counsel for Appellant.

Service accepted this 25 day of November, 1940.
Louis J. Vorhaus, Counsel for Appellee.

[fol. 140b] [File endorsement omitted.]

[fol. 141] Supreme Court of the United States

Designation by Appellee of Additional Parts of Record to be Printed—Filed December 3, 1940

Now comes the Appellee and designates the following additional parts of the record which she thinks material:

1. Portion of answer, setting forth first complete and separate defense, appearing on page 9a of the record.

2. Portion of opinion of Whalen, J., beginning with the words, "Defendant interposes two defenses", on page 45 of the record, and ending with the sentence, "Defendant has cited no case which pushes the doctrine of ultra vires to

the extent urged in this case", on page 53 of the record; and beginning and ending with the same words on pages 92 and 100 of the record, respectively.

3. Order directing the filing of the Municipal Court record in the office of the Clerk of the Supreme Court of the State of New York, appearing on pages 126-128 of the record.

[fols. 142-143] 4. Affidavit of David Teitelbaum in application for order directing the filing of the Municipal Court record in the office of the Clerk of the Supreme Court of the State of New York, appearing at pages 129-133 of the record.

Dated: December 2nd, 1940.

Louis J. Vorhaus, Counsel for Appellee.

Service accepted this 2nd day of December, 1940.

William J. Donovan, Counsel for Appellant.

[fol. 144] [File endorsement omitted.]

Endorsed on Cover: File No. 44,935, New York, Appellate Term, Supreme Court, Term No. 586. New York, Chicago & St. Louis Railroad Company, Appellant, vs. Dorothea T. Frank. Filed November 20, 1940. Term No. 586 O. T. 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 586

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

DOROTHEA T. FRANK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

WILLIAM J. DONOVAN,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 586

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

DOROTHEA T. FRANK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

The appellant, in support of the jurisdiction of this Court to review the above entitled cause on appeal, respectfully represents:

Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, 937 (United States Code, Title 28, Section 344), provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "(a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit

could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

Conflicting Statutes Involved.

Section 20a of the Interstate Commerce Act, as amended February 28, 1920, 41 Stat. 494, § 439 (U. S. C. Title 49, Sec. 20a), upon which appellant relied, reads in part as follows:

"SEC. 20a, (1) That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

"(2). From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and

the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption * * *

* * * * * * *

"(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

* * * * * * *

"(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization * * *."

Section 143 of the New York Railroad Law (Consolidated Laws of New York, Vol. 48, p. 158) upon which the plaintiff below relied reads as follows:

"The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue

in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it. No actions or proceedings in which either of such corporations is a party shall abate or be discontinued by such agreement and act of consolidation, but may be conducted to final judgment in the names of such corporations, or such new corporation may be, by order of the court, on motion substituted as a party."

The question presented is which statute governs this case. The courts below held the State statute governed (R. 301-305).

Date of Judgment and Date of Application for Appeal.

The judgment sought to be reviewed was entered on the 28th day of June, 1940, in the Appellate Term of the Supreme Court of the State of New York, First Department.

An order denying leave to appeal from the judgment to the Appellate Division of the Supreme Court of the State of New York, First Department, was entered in the said Appellate Division on the 9th day of October, 1940.

The application for appeal was presented on the 11th day of October, 1940.

Nature of the Case and Ruling of the Court.

This was a suit begun in the Municipal Court of the City of New York, to collect from appellant the face amount of five overdue interest coupons upon bonds of the Northern Ohio Railroad Company, allegedly guaranteed by the Lake Erie & Western Railway Company. The appellant was alleged in the complaint (R. 277-284) to have become liable upon the guaranty by assuming it in connection with

the consolidation of the Lake Erie & Western with four other railroad companies, which resulted in the formation of the appellant. In its answer to the complaint appellant set up that it had never been authorized, as provided in Section 20a of the Interstate Commerce Act, *supra*, to assume the obligation described in the complaint (R. 287-289). Thereupon each party filed a motion for summary judgment, supported by required affidavits (R. 43-51). Appellant's motion and required affidavits set forth as its sole ground that Section 143 of the New York Railroad Law, *supra*, relied upon by plaintiff below (R. 13 and 301), was inconsistent with Section 20a of the Interstate Commerce Act, *supra*, and also that the said State act was superseded by the said Federal statute (R. 50). The court, in a written opinion, rejected these contentions, and upheld the validity and application of the State statute by what appears to be an artificial narrowing the Federal statute beyond what would seem to be its proper and reasonable scope (R. 292, 301). The court held that the Federal statute had no application to security obligations imposed by State law. For that reason it sustained the motion of the plaintiff below for summary judgment, and denied that of appellant (R. 7 and 8). To review that action, an appeal was perfected to the Appellate Term of the Supreme Court, First Department (R. 3). No formal assignments of error are required in that Court, the appeal itself constituting the challenge to the correctness of the action of the trial court in denying appellant's motion for summary judgment, and granting that of plaintiff below (R. 3). The Appellate Court affirmed, without opinion, the judgment of the trial court. Thereupon a formal motion was filed for leave to appeal to the Appellate Division of the Supreme Court, First Department, but such motion was denied by the Appellate Term on August 12, 1940. A similar motion

was filed in the Appellate Division, and denied by that court on October 9, 1940.

The judgment to be reviewed, therefore, was entered in the highest court of the State of New York in which a review could be had.

The Question Presented is Substantial.

The question sought to be reviewed is substantial. There are numerous State statutes similar to Section 143 of the New York Railroad Law, purporting to impose upon consolidated railroad companies the obligations of their constituent companies. Most of these statutes were, like the New York law, adopted prior to the passage of the Transportation Act of 1920, of which Section 20a is a part. One of the purposes of that Act was to vest in the Interstate Commerce Commission the exclusive regulatory power to determine in the public interest what financial burdens should be assumed by interstate carriers and "to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties." (*Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331 (1924)). In furtherance of that purpose, Congress provided in Section 20a that interstate carriers should not assume any obligations in respect of the securities of others without the consent of the Interstate Commerce Commission, and that any purported assumption without such consent should be void. Section 143 of the New York Railroad Law and similar State statutes are in direct conflict with said Federal statute if they are applied, as the New York law has been by the State courts here, to security obligations of the constituents of a consolidated interstate carrier which has not received authority from the Interstate Commerce Commission to assume such obligations.

Certainly the financial ability of interstate carriers to discharge their interstate commerce duties may be hamp-

ered quite as much by security obligations attaching by operation of law as a result of consolidations as by security obligations expressly assumed. Congress, intending to give the Interstate Commerce Commission power to regulate the security obligations of carriers, can hardly have intended virtually to nullify that power as to consolidated carriers by permitting security obligations to be imposed upon such carriers by State statutes. The defendants' consolidation was accomplished under State laws, and the consent of the Commission to such consolidation was not required. (*Snyder* v. *New York Chicago & St. Louis Railroad Co.*, 278 U. S. 578 (1929)). If Section 20a is construed as it has been by the State courts, the Commission was, therefore, powerless at that time to prevent the defendant or other interstate carriers from undertaking heavy security obligations as the result of consolidation. Section 143 of the New York Railroad Law, applied as it has been by the New York courts, is invalid because in conflict with the words and policy of the Interstate Commerce Act. Under that Act, the Interstate Commerce Commission has exclusive jurisdiction to determine what security obligations shall be undertaken by interstate carriers, and the States have no power to impose such obligations without the approval of the Commission.

Concretely stated, the judgment here sought to be reviewed takes away the power which Congress conferred upon the Interstate Commerce Commission in Section 20a of the Interstate Commerce Act, and transfers that power to the State authorities. This Court should say whether the Federal statute may be evaded in the manner pointed out by the courts below.

The question is one which has not been previously decided by this Court. In *Mars* v. *Missouri-Kansas-Texas R. Co.*, 278 U. S. 258 (1929), the validity of a Texas statute

providing that in case of a sale of railroad property, the property should be "charged with and subject to" all subsisting liabilities for property damage was questioned as repugnant to Section 20a of the Interstate Commerce Act. This Court, in holding that the State statute was valid, did so solely on the ground that the obligations imposed by it were not obligations "in respect of securities". In the present case, the obligations sought to be imposed upon the defendant are, of course, security obligations. In no other reported case has the question of the validity of a State statute of this character, challenged as repugnant to Section 20a of the Interstate Commerce Act, been considered by this Court.

Although the conflict of statutes in the *Mars* case was apparently far less substantial than in the case at bar, this Court, nevertheless, took jurisdiction thereof by appeal rather than on certiorari.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Mars v. *Missouri-Kansas-Texas R. Co.*, 278 U. S. 258 (1929);

Alabama Ry. v. *Jackson Ry.*, 271 U. S. 244 (1926);

Dahnke-Walker Co. v. *Bondurant*, 257 U. S. 282 (1921);

Ward & Gow v. *Krinsky*, 259 U. S. 503, 510 (1922);

Fiske v. *State of Kansas*, 274 U. S. 380, 385 (1927);

Bryant v. *Zimmerman*, 278 U. S. 63, 67.

Respectfully submitted,

WILLIAM J. DONOVAN,
Counsel for Appellant.

EXHIBIT "A".

(Opinion of Whalen, J.)

Supreme Court of the State of New York, Appellate Term. First Department.

DOROTHEA T. FRANK, Plaintiff-Respondent,

against

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY, Defendant-Appellant

March 15, 1940.

Hon. Thomas J. Whalen, Justice.

House, Grossman, Vorhaus & Hemley, Esqs., 521 Fifth Avenue, New York, N. Y., Attorneys for the Plaintiff.

Donovan, Leisure, Newton & Lumbard, Esqs., 2 Wall Street, New York, N. Y., Attorneys for the Defendant.

WHALEN, *J.:*

Plaintiff moves for summary judgment in an action upon interest coupons attached to bonds issued by the Northern Ohio Railway Company under date of October 1, 1895, bearing the guaranty of punctual payment endorsed thereon by The Lake Erie & Western Railroad Company. There are five causes of action based upon five separate coupons, maturing April 1, 1939, in the sum of $25 each, and unpaid. The defendant is a consolidated corporation organized April 11, 1923, pursuant to the statutes of New York, Pennsylvania, Ohio, Indiana and Illinois, and is being sued as a New York corporation. The Lake Erie & Western Railroad Company was an Illinois corporation and was one of the constituents of the consolidated corporation.

Section 143 of the Railroad Law of the State of New York, pursuant to which the consolidation was effected, provides that the debts and liabilities of the several consolidating corporations shall attach to and become liabilities of the consolidated corporation. Hence this suit against this defendant.

Defendant interposes two defenses:

1) That the guaranty given by The Lake Erie & Western was ultra vires and wholly void.

2) That the defendant, an interstate carrier, was never authorized by the Interstate Commerce Commission to assume the guaranty as required by Section 20(a) of the Interstate Commerce Act, and that without that authorization there can be no liabiliy inasmuch as any such assumption of liability is illegal and void.

In its brief defendant does not question the sufficiency of the affidavits presented on plaintiff's affirmative case.

In support of its defense of ultra vires defendant presents voluminous affidavits and exhibits from the records of the corporations directly involved which, it is claimed, raise at least an issue of fact as to the power of The Lake Erie & Western to guarantee payment of the bonds and coupons of the Northern Ohio, and consequently require a denial of the motion.

Briefly summarized, defendant presents the following facts respecting the history and relationships of defendant, The Lake Erie & Western and the Northern Ohio:

The Lake Erie & Western was an Illinois corporation organized February 10, 1887.

The Pittsburgh, Akron & Western Railway Company was an Ohio corporation operating a line of railway in the State of Ohio. In 1894, having defaulted in payment of interest on its first mortgage bonds, a proceeding was brought to foreclose the mortgage and a decree of foreclosure was entered, May 23, 1894.

On October 8, 1894, at a directors' meeting of The Lake Erie & Western, the President, Calvin S. Brice, was authorized to acquire the railway if he could do so within certain limited terms. He thereafter conducted negotiations through a corporation controlled by him, called the Central Contract & Finance Co., with a Committee representing the bondholders on the defaulted bonds of the P. A. & W. leading to an agreement whereby The Lake Erie & Western, instead of purchasing the railway outright, arranged to organize a new corporation to which title would pass and then have The Lake Erie & Western lease the line of railway

perpetually and pay as rental the net proceeds of the line to the lessor and also to guarantee payment of principal and interest of bonds to be issued by the new corporation. This was later done except that the line was leased for 999 years instead of perpetually. A new corporation, the Northern Ohio Railway Co. was organized under the laws of the State of Illinois. The Northern Ohio issued bonds in the amount of $2,500,000, secured by a first mortgage on its line and The Lake Erie & Western arranged with a syndicate of bankers, headed by Vermilye & Co., to sell the bonds with the guaranty of The Lake Erie & Western endorsed thereon. From the records it appears that this guaranty was a very important, if not the principal, consideration for the purchase of the bonds.

A lease was given by the Northern Ohio to The Lake Erie & Western, of all its properties for 999 years. All these proceedings were approved and thereafter ratified by the Boards of Directors and stockholders of both corporations, the active agent at all times being Calvin S. Brice, the President of The Lake Erie & Western.

While all these various steps took time and were accomplished on various dates, the effective date of the whole operation including the bonds, mortgage and lease, was October 1, 1895. Thereafter, until 1919, the line of railway owned by the Northern Ohio was operated under the lease by The Lake Erie & Western.

As to the defense of ultra vires, defendant cites the general principle, to the effect that a corporation, unless authorized by its charter or the statutes of the state of its organization, is without authority to guarantee the bonds or debts of any other corporation. This rule is expressed in the following excerpt from *Louisville (etc.) Ry. Co.* v. *Louisville Trust Co.*, 174 U. S. 552 (1898):

"A railroad corporation unless authorized by its act of incorporation or by other statutes to do so, has no power to guarantee the bonds of another corporation; and such a guaranty, or any contract to give one, if not authorized by statute, is beyond the scope of the powers of the corporation, and strictly ultra vires, unlawful and void, and incapable of being made good by ratification or estoppel."

However, there are exceptions to this general rule and in the opinion in the same case, at page 573, appears the following:

"One who takes from a railroad or business corporation in good faith, and without actual notice of any inherent defect, a negotiable obligation issued by order of the board of directors, signed by the president and secretary, in the name and under the seal of the corporation and disclosing upon its face, no want of authority, has the right to assume its validity, if the corporation could, by any action of its officers or stockholders, or of both, have authorized the execution and issue of the obligation."

These bonds and their interest coupons, payable to bearer, are negotiable instruments.

Evertson v. *National Bank of Newport*, 66 N. Y. 15.

There is no reason shown here to doubt that plaintiff is a bona fide purchaser for value without notice of any defect in these bonds or coupons.

The Lake Erie & Western was an Illinois corporation organized in 1887. It was not expressly authorized either in its Articles of Incorporation or by any general statute of Illinois to guarantee the obligations of any other person, natural or artificial. The power, if it had any, to make the guaranty must be found in the implied powers of the corporation. A corporation has implied powers to do all things necessary or incidental to the exercise of the powers expressly granted.

Calument etc. Dock Co. v. *Conkling*, 273 Ill. 318-322.

Under the statutes of Illinois (Act of February 12, 1855; Laws 1855, p. 304) a railroad corporation of that State had power to enter into leases with other railroad corporations:

Pennsylvania R.R. Co. vs. *St. Louis, Alton & Terre Haute Railroad Company*, 118 U. S. 290 (1885).

It has been held that if a railroad corporation has power to take a lease of the lines of another corporation it has power to make agreements appropriate to such a transac-

tion, such as payment of rent and guaranteeing payment of bonds of the lessor.

6 Fletcher Cyc. Corp., Sec. 2719, p. 574.

Eastern Townships Bank vs. *St. Johnsbury & L. C. R. Co.*, 40 Fed. 423, writ of error dismissed 149 U. S. 772.

When a railroad corporation has possession of bonds of another railroad corporation it has power to endorse its guaranty thereon for the purpose of sale.

Railroad Co. vs. *Howard*, 7 Wall. 392 (1868);

Arnot vs. *Erie Railway Co.*, 67 N. Y. 315 (1876).

When the guarantor is in reality the principal and the ostensible obligor on the bonds is in reality the creature of the guarantor the guarantee will be valid.

Lake St. El. R.R. Co. vs. *Carmichael*, 184 Ill. 348 (1900).

It seems to me that this case comes within all of these exceptions to the general rule.

The guaranty was not executed for the accommodation of the Northern Ohio, but the entire transaction was a device engineered by The Lake Erie & Western for its own accommodation, in order to enable it to acquire control of the line of the old P. A. & W. so as to extend The Lake Erie & Western lines eastward.

Calvin S. Brice gave the instructions to a firm of attorneys for the organization of the Northern Ohio, for the preparation of the bond and mortgage and for the preparation of the lease. The Lake Erie & Western was the principal in the same way as the railroad was the principal in the Carmichael case.

Defendant claims The Lake Erie & Western never had actual possession of the bonds but they constructively passed through the hands of its secretary when he authorized delivery to Vermilye & Co., and in any event the question is not what was actually done but what The Lake Erie & Western had power to do so far as an innocent purchaser for value is concerned.

Louisville (etc.) Ry. Co. vs. *Louisville Trust Co.* (supra).

The information about this was not a matter of public record and defendant would be estopped from setting up any mere irregularity as against this defendant. (*Idem.* p. 575.)

The Lake Erie & Western had express power under the Illinois statute to enter into a lease arrangement with another railroad and it had implied power to make such terms as were necessary to carry out the lease.

In the case of Eastern Townships Bank vs. St. Johnsbury & L. C. R. Co. (supra) it was held that a lessee railroad corporation had power to guarantee payment of the bonds of its lessor, in view of a state statute authorizing one railroad corporation to lease the lines of another. The Vermont statute (R. L. Vt. Sec. 3303) is similar to the Illinois statute (L. 1855, p. 304, R. S. 1874, p. 807).

The cases of ultra vires cited by defendant are all cases where the transactions were held to be ultra vires because they were not made in furtherance of the purposes for which the corporations were organized, or because they were made in direct violation of a statute, such as the statutes of Illinois relating to the acquisition of land by a corporation. No Illinois statute has been cited prohibiting a railroad corporation from guaranteeing bonds in any case and under any circumstances. Defendant has cited no case which pushes the doctrine of ultra vires to the extent urged in this case.

In support of its second defense, defendant cites Section 20 (a) of the Interstate Commerce Act, and submits affidavits showing that no application was ever made to, or authorization ever granted by, the Interstate Commerce Commission to the assumption by defendant of liability on the guaranty in question.

Defendant urges this as a conclusive bar to the action and because the facts are not disputed makes a cross motion for summary judgment in its favor.

Section 143 of the Railroad Law of the State of New York provides that in case of consolidation "all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation."

Section 20 (a) of the Interstate Commerce Act, as amended by the Transportation Act of 1920, provides that it shall be unlawful for any carrier to issue or assume any

liability in respect of the securities of any other person, natural or artificial, unless the Interstate Commerce Commission authorizes such assumption.

Defendant claims that Section 20 (a) supersedes Section 143 of the New York Railroad Law and, inasmuch as no authorization has been obtained, the consequence is defendant has assumed no liability as guarantor of the Northern Ohio bonds.

Again defendant cites no cases directly in point. It claims that

> *Missouri-Kansas Texas R. Co. of Texas* v. *Mars*, 294 S. W. 941 (Texas Civil Appeals 1927)

is in point, but that case was reversed by the Texas Commission of Appeals (298 S. W. 271, 1927), and the reversal was affirmed by the United States Supreme Court (278 U. S. 258) on the ground that securities were not involved in the case.

It seems to me that the dispute here revolves around the meaning to be given to the word "assume" as used in Section 20 (a) of the Interstate Commerce Act. If that means something different than the liability imposed by Section 143 of the Railroad Law of the State of New York, the two statutes may be reconciled and there is no conflict between them. If they do have the same meaning, then undoubtedly the Commerce Act controls because it is the supreme law of the land.

The word "assume" connotes a voluntary action and is directly applicable to leases where a lessee railroad attempts to assume liability on the debt of its lessor. This happened in

> *New York Central Securities Corp.* v. *U. S.*, 54 Fed. (2d) 122, S. D. N. Y., 1931, aff'd 287 U. S. 12 (1932).

Words & Phrases, Fifth Series, Vol. 1, p. 592, defines the word "assume" as "to take upon oneself."

The word "assume" does not appear in Section 143 of the Railroad Law. Defendant argues as though it does. Instead the word "attach" appears. At the moment of consolidation the defendant did not "assume" the debts of The Lake Erie & Western. Instead, these debts immediately

became its own debts. It acquired a direct liability of its own. It did not at that moment guarantee any debt of The Lake Erie and Western, but, rather, became liable on its own debt which attached by reason of the statute. It did not assume an "obligation" of any other person, natural or artificial.

No instance has been cited to me of any application to the Interstate Commerce Commission by a consolidated corporation to assume the debts of the constituent corporations, and I think the reason may be found in the fact that the Interstate Commerce Commission has not yet assumed jurisdiction over the subject of consolidation under Section 5 of the Interstate Commerce Act, but has left these proceedings entirely to the jurisdiction of the States.

Snyder v. *New York, Chicago & St. Louis R. Co.*, 278 U. S. 578;

Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company, 71 I. C. C. 581.

Therefore, no approval was sought of the Commission for the consolidation and none was necessary.

The Commission did, however, issue a certificate of convenience and necessity and must have done so with knowledge of the incidents of the consolidation under State law, including the attaching of the liabilities of the constituent corporations to the consolidating corporation.

The complaint, it seems to me, falls into the same error in the use of the word "assume" in the fifth paragraph. However, as that is a conclusion of law, it may be disregarded as surplusage, inasmuch as the other allegations of the paragraph (if we accept the word "merger" as meaning "consolidation") state the essential facts for a cause of action.

My conclusion is that it was not necessary for the defendant to make an application to the Interstate Commerce Commission or to receive its authorization under Section 20 (a) before becoming liable on The Lake Erie & Western guaranty of the Northern Ohio bonds.

It follows that defendant's motion for summary judgment must be denied, and plaintiff's motion will be granted.

No. 586 15

IN THE

Supreme Court of the United States

October Term, 1940

NEW YORK CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

v.

DOROTHEA T. FRANK,

Appellee.

ON APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR THE APPELLANT OPPOSING APPELLEE'S MOTION FOR DISMISSAL OF APPEAL OR AFFIRMANCE OF JUDGMENT BELOW

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NEW YORK CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

v.

DOROTHEA T. FRANK,

Appellee.

On Appeal from the Appellate Term of the Supreme Court of the State of New York

BRIEF FOR THE APPELLANT OPPOSING APPELLEE'S MOTION FOR DISMISSAL OF APPEAL OR AFFIRMANCE OF JUDGMENT BELOW

This brief is submitted in opposition to appellee's motion which in the alternative asks (1) that the appeal be dismissed on the ground that it involved no substantial question; or (2) that the judgment of the Court below be affirmed on the ground that the question involved is so wanting in substance as not to require further argument.

OPINIONS BELOW

The only opinion in this case was that of the Municipal Court of the City of New York (R. 44-57) which has not been reported. The Appellate Term of the Supreme Court of the State of New York affirmed without opinion (R. 68-69).

JURISDICTION

The judgment of the Appellate Term of the Supreme Court of the State of New York was entered on June 28, 1940 (R. 68). Leave to appeal to the Appellate Division of the Supreme Court of the State of New York was denied by the Appellate Term on August 12, 1940 (R. 74) and by the Appellate Division on October 9, 1940 (R. 76). The appeal to this Court was allowed by Mr. Justice Stone on October 11, 1940.

The jurisdiction of this Court was invoked under Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chapter 229, Section 1 (43 Stat. 936, 937; 28 U. S. C. §344).

THE ISSUE INVOLVED ON THIS MOTION

The issue involved on this motion is whether the appeal presents this Court with a substantial Federal question within its jurisdiction.

The Federal question here involved is whether Section 143 of the Railroad Law of New York (quoted at p. 5 below), as construed and applied by the state courts below is repugnant to Section 20a of the Interstate Commerce Act (quoted at pp. 3-5 below).

This state law provides that upon the consolidation of railroad corporations the liabilities of constituents shall attach to the consolidated corporation. Section 20a of the Interstate Commerce Act forbids interstate carriers to assume obligation or liability in respect of securities, without the prior approval of the Interstate Commerce Commission; and declares that such assumptions without that approval are void. The state courts below held that upon consolidation the liability of one of appellant's constituents as guarantor of certain securities attached to appellant by virtue of the state law, although appellant is an interstate carrier and the Interstate Commerce Commission never approved its assumption of such liability.

STATUTES INVOLVED

Section 20a of the Interstate Commerce Act, as amended by the Transportation Act of 1920, 41 Stat. 494, § 439 (49 U. S. C. §20a), upon which appellant relies, reads in part as follows:

> "Sec. 20a (1) That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.
>
> "(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this sec-

tion collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

* * *

(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than as specified herein.

* * *

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having

first been obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization.* * *"

Section 143 of the New York Railroad Law (Consolidated Laws of New York, Chap. 49, §143) upon which the appellee relies reads as follows:

"The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it. No actions or proceedings in which either of such corporations is a party shall abate or be discontinued by such agreement and act of consolidation, but may be conducted to final judgment in the names of such corporations, or such new corporation may be, by order of the court, on motion substituted as a party."

STATEMENT

The nature of the case and the rulings of the courts below are fully set forth in appellant's statement as to jurisdiction on appeal filed on October 11, 1940 (R. 82-90). Concisely stated, they are as follows:

This is an action brought by appellee in the Municipal Court of the City of New York to recover from appellant the face amount of five overdue interest coupons upon bonds of the Northern Ohio Railway Company allegedly guaranteed by The Lake Erie & Western Railroad Company. Recovery is sought against appellant on the ground that it is a consolidated railroad corporation, formed in 1923 by the consolidation of The Lake Erie & Western Railroad Company and four other railroad companies (not including the Northern Ohio Railway Company); and that by virtue of Section 143 of the Railroad Law of New York (pursuant to which law, among others, the consolidation was effected) the obligations of The Lake Erie & Western Railroad Company with respect to this guaranty were imposed upon appellant. Appellant, by answer and motion for summary judgment, contended that under Section 20a of the Interstate Commerce Act, to which it is subject, no such guaranty obligation with respect to securities can be assumed by it or imposed upon it in the absence of the express authorization of the Interstate Commerce Commission; and if Section 143 of the Railroad Law of New York be construed to impose such obligation upon the appellant in the absence of such authorization from the Interstate Commerce Commission, it is repugnant to Section 20a of the Interstate Commerce Act and therefore inoperative. The record shows (R. 32) that the Interstate Commerce Commission has never authorized appellant to assume the guaranty obligations here involved.

The Municipal Court held that Section 20a of the Interstate Commerce Act is not applicable to security obligations of constituent railroad corporations imposed upon the consolidated railroad corporation by virtue of Section 143 of the Railroad Law of New York, and that therefore there is no repugnancy between the State and Federal statutes (R. 53-57). Summary judgment was entered for appellee on her motion (R. 58); and this judgment was affirmed on appeal by the highest court of the State in which a review could be had (R. 68).

SUMMARY OF ARGUMENT

Appellee's motion should be denied because:

I. The Federal question presented is substantial. It requires an authoritative determination of the scope of the regulatory authority conferred by the Transportation Act of 1920 (particularly Section 20a of the Interstate Commerce Act) upon the Interstate Commerce Commission with respect to financial burdens of interstate carriers; and the extent, if any, to which the states continue to have legislative authority in this respect.

II. Appellant's contention with respect to the Federal question here involved has not been foreclosed by earlier decisions of this or other courts, as claimed by appellee. On the contrary, such decisions as appear to have any pertinency support appellant's contention.

ARGUMENT

I.

The federal question presented is substantial. It requires an authoritative determination of the scope of the regulatory authority conferred by the Transportation Act of 1920 (particularly Section 20a of the Interstate Commerce Act) upon the Interstate Commerce Commission with respect to financial burdens of interstate carriers; and the extent, if any, to which the states continue to have legislative authority in this respect.

Section 20a(2) (*supra*, p. 3) makes it unlawful "* * * for any carrier * * * to assume any obligation or liability as * * * guarantor * * * or otherwise, * * * in respect of the securities of any other person * * * even though permitted by the authority creating the carrier corporation, unless and until and then only to the extent that upon application by the carrier and after investigation by the Commission of the purposes and uses of the * * * proposed assumption of obligation or liability * * * the Commission by order authorizes such * * * assumption."

Section 20a(11) (*supra*, p. 4) makes any such obligation or liability assumed by a carrier void if authorization for such assumption is not first obtained from the Interstate Commerce Commission.

The appellee contended and prevailed below on the ground that the liability said to be imposed upon the appellant by virtue of Section 143 of the Railroad Law of

New York was not a liability "assumed" within the meaning of Section 20a. The court below held that only voluntary assumptions of liability were within the purview of Section 20a; and that the statutory imposition of liability here involved was not such a voluntary assumption.

The consolidation was voluntary and therefore any liability resulting therefrom under Section 143 would have been assumed voluntarily.

In any event, assumptions by operation of law are as common as voluntary assumptions; and there is nothing to show that Congress in speaking of the assumption of liabilities referred only to voluntary assumptions. Lawyers and judges have always spoken of liabilities imposed by operation of law as being liabilities "assumed" by operation of law. Indeed the New York Court of Appeals has itself characterized the imposition of liability provided for in Section 143 of the Railroad Law of New York as an assumption by operation of law. *Polhemus* v. *Pittsburgh R. Co.*, 123 N. Y. 502, 508 (1890). Similarly, in *Bailey* v. *Railroad Company*, 22 Wall. 604, 630 (1874), this Court, in speaking of an earlier New York statute similar to Section 143 of the Railroad Law stated that by virtue of the statute "the new company formed by the act of consolidation assumed all the obligations of the old company."

The question here is whether or not Congress in making Section 20a applicable to "assumptions" of security obligations intended to include the attempted "attachment" of security obligations by virtue of state statute. A similar question involving "undertakings" arose in *Railroad Commission* v. *Southern Pacific Company*, 264 U. S. 331 (1924), where the Court considered the meaning

of Section 1(18) of the Interstate Commerce Act which provided:

> "* * * no carrier by railroad subject to this Act shall undertake the extension of its line of railroad or the construction of a new line of railroad * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, * * * of such additional line of railroad, * * *" (41 Stat. 477)

The California State Railroad Commission had ordered the defendant interstate railroads to establish a new union terminal and to construct lines leading to that terminal. No application was ever made to the Interstate Commerce Commission under Section 1(18). This Court held that the California Commission's order was inoperative until the Interstate Commerce Commission acted under Section 1(18).

The facts in the *Southern Pacific* case seem to be squarely analogous to those in the case at bar. There the statute forbade the railroad to "undertake" certain construction without the approval of the Interstate Commerce Commission. Here Section 20a forbids the railroad to "assume" obligations without the authorization of the Interstate Commerce Commission. In each case the duty or obligation of the railroad was imposed by state authority. If the involuntary origin of the duty in the *Southern Pacific* case was not enough to remove it from the exclusive jurisdiction of the federal agency over "undertakings," it follows that the involuntary origin of the present defendants' liability would not remove it from the exclusive jurisdiction of the federal agency over "assumptions" of liability.

Analysis and consideration of the context and purpose of the relevant provisions of the Transportation Act also support appellant's construction of Section 20a. Section 20a is an amendment to the Interstate Commerce Act enacted in the Transportation Act of 1920. A reading of the Transportation Act as a whole, and reference to the matters which it was designed to remedy, leaves no doubt that Congress intended to vest in the Interstate Commerce Commission the exclusive regulatory power to determine in the public interest what financial burdens should be undertaken by interstate carriers. As this Court said in *Railroad Commission* v. *Southern Pacific Company, supra*:

> "The purpose of Congress to prevent interstate carriers from incurring expense which will lessen their ability to perform well their interstate functions is further shown in §439 of the Transportation Act, whereby the Interstate Commerce Act is amended by insertion of §20a. This new section subjects to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all future shares of stock, bonds or other evidence of indebtedness and forbids approval unless the Commission shall find that their issue is for a lawful purpose, is compatible with the public interest, is appropriate and necessary to the discharge of its public duty as a common carrier and will not impair its ability to perform that service. This is of course *in pari materia* with the restriction of paragraph 21 of §402 [i. e. Section 1(18) of the Interstate Commerce Act] to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties." (p. 347)

If the purpose of the relevant provisions of Section 20a is, as the Supreme Court has said, "to prevent a pos-

sible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties" the statutory prohibition against assumptions of security obligations without leave of the Interstate Commerce Commission must have been intended by Congress to have extended to the liability which it is claimed the appellant here assumed. Certainly the financial ability of interstate carriers to discharge their interstate commerce duties may be affected quite as much by a mass of security obligations imposed upon a railroad by operation of a State statute as by such obligations expressly assumed thereafter.

Related provisions in the Transportation Act with respect to the security obligations of railroads indicate that it was the intent of Congress to give the Interstate Commerce Commission plenary and exclusive powers of regulation over such matters. Section 20a(7) expressly declares the jurisdiction of the Commission to be "exclusive and plenary." Securities issued and security obligations assumed by carriers without approval of the Commission are declared to be "void" even though this may involve hardship to the holders of such securities. Only the issuance of short-term notes maturing within not more than two years and aggregating not more than 5% of the par value of the carrier's outstanding securities does not require prior approval of the Commission; and even as to such short-term notes carriers must keep the Commission promptly and fully informed [Section 20a(9)(10)].

If the security obligations involved in the case at bar are not within the purview of Section 20a, they appear to be the only class of security obligations not brought within the control of the Commission by the statute. It does not seem possible that Congress should have made

provision for such relatively inconsequential security obligations as short-term notes for an aggregate of less than 5% of the carrier's outstanding securities and yet have made no provision whatever for the regulation or control of the much greater security obligations which might be imposed by state laws as a result of consolidations.

Section 20a(2) sets up the factors to be taken into consideration by the Commission upon application for leave to issue or assume security obligations. The Commission must find not only that the transaction is for some lawful object within the carrier's corporate purposes but must also find that it will be "compatible with the public interest," that it is "necessary or appropriate for and consistent with the proper performance * * * of service to the public as a common carrier" and that it will not "impair its ability to perform that service." Given such a broad grant of power with standards so explicitly related to the public interest, we submit that Congress could not have intended that a large class of security obligations, without regard to their effect upon the public interest, should be outside the purview of the statute merely because they were imposed upon the carrier by operation of state statutes.

It would be a mockery for the Interstate Commerce Commission carefully to consider whether a railroad shall be permitted to assume a single security obligation, if without reference to the Interstate Commerce Commission and without being subject to its approval, a group of railroads could be consolidated under state laws and the consolidated railroad be burdened with a mass of security obligations, fixed and contingent, of the weaker roads consolidated. We submit that Congress intended no such result; and Section 20a should not be so construed.

At the time of the consolidation which resulted in the formation of the appellant, there was no other provision of the Interstate Commerce Act under which the Commission could, in such consolidations as that of appellant, have prevented carriers from undertaking security obligations so burdensome as to impair their ability to perform their public duties. The only other section of the Act which might have conferred such jurisdiction was Section 5. But this Court specifically held that the consolidation whereby appellant was created in 1923, was not subject to the jurisdiction conferred upon the Commission under Section 5, because the Commission had not then promulgated its nation-wide scheme of consolidation. *Snyder* v. *N. Y. C. & St. L. R. Co.*, 278 U. S. 578 (1929).

In the appellee's motion papers it is suggested (R. 116-117) that the Commission had the power to and did in fact pass upon the propriety of the imposition of the security obligations here involved when it authorized the appellant, under Section 1(18) of the Interstate Commerce Act, to acquire and operate the lines of its constituents and, under Section 20a, authorized the issuance by the appellant of its stock in exchange for the stock of its constituents. This is simply not so.

In the first place, it does not appear that the security obligations here involved were brought to the attention of the Commission in any way (*Acquisition and Stock Issue by N. Y., C. & St. L. R. R.*, 79 I. C. C. 581 [1923]). Obviously, if the Commission was not apprised of the guaranty, it cannot be said to have approved its assumption by the appellant. It clearly did not specifically authorize the assumption by the appellant of this or any other security obligation of its constituents.

Furthermore, the wisdom of the assumption by the appellant of any security obligations of its constituents was not before the Commission for its consideration. The finding and certificate of the Commission that appellant's acquisition and operation of the lines of its constituent roads was convenient and necessary in the public interest in no way implies an approval of the assumption by or imposition upon the appellant of any security obligations. Indeed, the fact that separate application was made and authority granted, pursuant to Section 20a, for the issuance of stock by the appellant shows that security obligations were not considered in connection with the application for a certificate of public convenience and necessity. The finding of the Commission, under Section 20a, that the issuance of the appellant's stock was for lawful objects within its corporate purposes and compatible with the public interest and necessary and appropriate for the proper performance by it of service to the public as a common carrier certainly involves no finding by the Commission that it would have been "compatible with the public interest" for the appellant to assume the security obligations here involved or any other security obligations of its constituent companies.

The Commission's remarks in *New York, Chicago & St. Louis R. R. Bonds*, 82 I. C. C. 365 (1923), cited in the appellee's motion papers (R. 117) have no significance. The passage quoted is from an opinion rendered by the Commission upon an application made shortly after the consolidation by one of the appellant's constituents for authority to issue certain bonds in accordance with the terms of a mortgage existing prior to the consolidation, and a concurrent application by the appellant for authority to assume liability in respect of those bonds. Since a new

issue of bonds was involved, the Commission had no occasion to pass upon the question of whether the appellant was liable by virtue of state statutes upon security obligations of its constituents existing prior to the consolidation, such as the obligations presently involved. To say that the appellant is vested with the property of the constituent companies "subject to all their debts, obligations and liabilities" is not to say that the appellant has any personal liability for such debts, obligations and liabilities. It is to say only that the appellant acquired the properties of its constituents subject to liens in favor of the creditors of those constituents. Similarly, a purchaser of mortgaged property who acquires it "subject to" the mortgage does not thereby assume a personal liability for the mortgage debt. The mortgagee may enforce the obligation against the mortgaged property, but not against the purchaser personally.

The Commission has, in fact, indicated that it does not believe that by virtue of the state statutes personal liability was imposed upon appellant in respect of security obligations of its constituents. Several years after the consolidation, the Commission, on application, granted appellant authority to assume various other such obligations. (See, for example, *New York, C. & St. L. R. Co. Assumption of Obligation*, 217 I. C. C. 598 [1936]; *New York, C. & St. L. R. Co. Bonds and Assumption*, 221 I. C. C. 772 [1937].) If the Commission had, at the time those applications were made, adopted the appellee's view, and that of the court below, that the defendant was liable upon such obligations by virtue of state statutes, it would have denied the applications as unnecessary and inappropriate.

These cases, as well as the issuance by the Commission of

the certificate of convenience and necessity (*Acquisition and Stock Issue by N. Y., C. & St. L. R. R.*, 79 I. C. C. 581 [1923]), are a sufficient answer to the suggestion of the Municipal Court (R. 56) that, because the Commission had not assumed jurisdiction of such consolidations under Section 5 of the Interstate Commerce Act, it had left consolidations and their incidents entirely to the jurisdiction of the states. The purely formal attributes of a consolidation were left to state laws, but the cases referred to show that the Commission has recognized its authority and duty to pass on the assumption by consolidated interstate carriers of the security obligations of their constituents.

No question of depriving creditors of constituent companies of their rights and property without due process of law can arise here. Appellee's argument to the contrary (R. 118) lacks merit. The fact is that appellee is really seeking rights additional to those for which she originally contracted. She is seeking in substance to require all the assets of the appellant to respond to her demands. Her contractual rights are limited to recourse only against the assets of one of appellant's constituents, the Lake Erie & Western Railroad. These contractual rights she still possesses. *Railroad Co.* v. *Howard*, 7 Wall. 392 (1868).

To be sure Section 143 of the Railroad Law of New York does provide for the imposition of liability upon consolidated railroad corporations. But such statutes are grounded only upon considerations of convenience to the creditors of constituent corporations; and such considerations must give way to the far greater considerations of national policy involved in Section 20a, of the Interstate Commerce Act—the need for regulation and control of the financial policies of interstate carriers, with a view to preventing the impairment of their ability to perform their public duties.

If Section 20a of the Interstate Commerce Act is construed, as its language plainly requires: that is, as applicable not only to voluntary assumption of security obligations by consolidated interstate carriers, but also to the assumption of security obligations which would be imposed upon such carriers by operation of state law—then the state statute imposing such obligations must, of course, be held invalid as repugnant to Section 20a. This Court and other courts have many times held that state statutes regulating interstate carriers, which are in similar conflict with the policy of Section 20a and other provisions of the Interstate Commerce Act, must yield to the paramount regulatory power of Congress. *New York Central Securities Corp.* v. *United States*, 54 F. (2d) 122 (S. D. N. Y., 1931), aff'd 287 U. S. 12 (1932); *Texas* v. *United States*, 292 U. S. 522 (1934); *People* v. *New York Central R. Co.*, 233 N. Y. 679 (1922); *Whitman* v. *Northern Central Ry. Co.*, 146 Md. 580, 127 Atl. 112 (1924).

II.

Appellant's contention with respect to the federal question here involved has not been foreclosed by earlier decisions of this Court.

This Court has never decided whether or not a state statute imposing liability upon a consolidated corporation for the security obligations of its constituent corporations is repugnant to or in conflict with Section 20a of the Transportation Act.

The appellee claims that *Missouri-Kansas-Texas Railroad Company* v. *Mars*, 278 U. S. 258 (1929) affirming 298 S. W. 271 (Texas, 1927) which reversed 294 S. W. 941 (1927) held such a state statute not to be so repugnant.

The *Mars* case involved a Texas statute which provided that in case of the sale of the property and franchises of a railroad, the property and franchises so purchased should be "charged with and subject to" all subsisting liabilities of the seller for damage to property. The Texas Court of Civil Appeals construed this statute as providing for an assumption by operation of law of such liabilities, and held that the plaintiff must allege in his complaint approval by the Interstate Commerce Commission of the imposition of the statutory obligation. The decision of the Texas Court is therefore a direct holding that Section 20a requires approval by the Commission of an imposition of liability by operation of state law.

This decision was reversed by the Texas Commission of Appeals on a procedural ground and because the Texas statute there examined, unlike Section 143 in the case at bar, imposed no personal liability on the purchaser but merely created a lien on the properties purchased. The United States Supreme Court affirmed the judgment of the Texas Commission of Appeals on the ground that Section 20a involves only the assumption of liability on "securities," whereas the plaintiff was suing pursuant to the Texas statute for damages for negligent injury to personal property. In the case at bar, of course, the question clearly involves "securities." It follows, therefore, that the *Mars* case does not support appellee's contention.

The retention of jurisdiction by this Court in the *Mars* case amply supports its retention here; for the question here presented is not only analogous but is also much closer and more difficult. If the *Mars* case involved a question sufficiently substantial for this Court to retain jurisdiction, *a fortiori* so does the case at bar.

CONCLUSION

For the reasons stated, it is respectfully submitted appellee's motion should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1940

No. 586 15

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

v.

DOROTHEA T. FRANK,

Appellee.

ON APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS APPEAL

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IN THE

Supreme Court of the United States

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No. 586

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Appellant

against

DOROTHEA T. FRANK,

Appellee.

On Appeal from the Appellate Term of the Supreme Court of the State of New York

BRIEF FOR APPELLANT IN OPPOSITION TO MOTION OF APPELLEE TO DISMISS APPEAL

This brief is submitted in opposition to the motion of the appellee to dismiss the appeal herein on the ground that the appeal is "improperly directed to the Appellate Term of the Supreme Court of the State of New York, First Department, instead of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District."

The appellee relies, in support of the motion, upon the fact that under the New York practice the judgment of the Appellate Term affirming the judgment of the Municipal Court was remitted to the Municipal Court for enforcement, the record was returned there (New York City Municipal Court Code, §163, N. Y. Laws of 1915, Ch. 279, p. 896), and the judgment of the Appellate Term was entered in the office of the clerk of the Municipal Court (New York Civil Practice Act §629, N. Y. Laws of 1920, Ch. 925, Vol. 4, p. 220, as amended by Laws of 1936, Ch. 656, p. 1435).

The contention that the appeal should therefore have been "directed to" the Municipal Court overlooks the following facts: This Court can review only a "final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had" (43 Stat. 936, 937; 28 U. S. C. §344). The judgment of affirmance in the Appellate Term was a final judgment rendered by the court in accordance with the New York Constitution (Art. 6, Sec. 8) and Civil Practice Act (§584, Laws of 1920, Ch. 925, Vol. 4, p. 205). Since the Appellate Division of the Supreme Court denied leave to appeal further (R. 44), the Appellate Term was the highest state court in which a decision could be had in the case at bar. The judgment of course remained a judgment of the Appellate Term despite the fact that it was required to be entered on the records of the Municipal Court clerk. In fact, the judgment of the Appellate Term had previously been entered in the office of the clerk of New York County (R. 41, 43), who is the clerk of the Appellate Term (New York Civil Practice Act, §701, N. Y. Laws of 1920, Ch. 925, Vol. 4, p. 23). If, therefore, this appeal had sought a review of the Municipal Court judgment, it might have been dismissed. *Second National Bank* v. *First National Bank*, 242 U. S. 630 (1917).

The appellee urges, however, that merely because at the time the appeal to this Court was allowed the record had been returned to the Municipal Court it was improper to "direct the appeal" to the Appellate Term. The order of this Court allowing the appeal directed the clerk of the Appellate Term to prepare and certify a transcript of record and transmit it to this Court (R. 47). Pursuant to this order the Appellate Term procured a return of the record from the Municipal Court and caused it to be filed with the clerk of this Court (R. 50). In adopting this practice the appellant merely followed the procedure which this Court has outlined and approved.

Thus, in *Atherton* v. *Fowler*, 91 U. S. 143 (1875), this Court sustained, against a motion to dismiss, a writ of error directed to the Supreme Court of California to review a judgment of that court modifying a lower court judgment. After stating (p. 146) that "it is, perhaps, safe to say that a writ of error will never be dismissed for want of jurisdiction, because it is directed to the highest court in which a decision was and could be had," the Court said:

> "The rule may, therefore, be stated to be that if the highest court has, after judgment, sent its record and judgment in accordance with the law of the State to an inferior court for safe keeping, and no longer has them in its own possession, we may send our writ either to the highest court or to the inferior court. If the highest court can and will, in obedience to the requirement of the writ, procure a return of the record and judgment from the inferior court, and send them to us, no writ need go to the inferior court; but, if it fails to do this we may ourselves send direct to the court having the record in its custody and under its control. So, too, if we know that

> the record is in the possession of the inferior court, and not in the highest court, we may send there without first calling upon the highest court; but if the law requires the highest court to retain its own records, and they are not in practice sent down to the inferior court, our writ can only go to the highest court. That court, being the only custodian of its own records, is alone authorized to certify them to us" (p. 148).

The cases cited by appellee are not in point. Four[1] of them arose in states whose practice was obviously different from that of New York. In each of them, the higher court did not render a judgment, but directed the lower court to render judgment in accordance with its determination of the appeal, and returned the record to the lower court. It was held that the writ of error or writ of certiorari from this Court could properly be directed to the lower court to review its judgment, which had been rendered at the direction of the higher court. In the instant case, however, a judgment has been rendered by the highest court in which a decision could be had. Appellee's motion shows on its face that these cases are not in point, for appellee concedes that there was a "judgment of the Appellate Term" (Appellee's motion, p. 3).

In *Hodges* v. *Snyder*, 261 U. S. 600 (1923), likewise relied upon by the appellee, this Court denied a motion to dismiss a writ of error directed to a Circuit Court of South Dakota. The judgment to be reviewed was a judgment of the Supreme Court of South Dakota reversing a

[1] *Central New England Ry. Co.* v. *Boston & A. R. Co.*, 279 U. S. 415 (1929); *Myers* v. *International Trust Co.*, 273 U. S. 380 (1927); *Higgins* v. *E. I. du Pont de Nemours & Co.*, 268 U. S. 638 (1925); *Wedding* v. *Meyler*, 192 U. S. 573 (1904).

prior judgment of the Circuit Court, but under the local practice the record on appeal had been remitted to the Circuit Court with copies of the judgment and opinion of the Supreme Court, and this Court held that under these circumstances the writ was properly directed to the Circuit Court. It was not held that the writ might not likewise have been properly directed to the Supreme Court. See also *Polleys* v. *Black River Improvement Co.*, 113 U. S. 81 (1885).

To sum up, the appeal herein properly sought a review of the judgment of the Appellate Term rather than that of the Municipal Court, and the practice followed in obtaining the record was one approved by this Court.

CONCLUSION

For the reasons stated, it is respectfully submitted that the appellee's motion should be denied.

Respectfully submitted,

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IN THE

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Appellant,

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Appellee.

On Appeal from the Appellate Term of the Supreme Court of the State of New York

---

BRIEF FOR THE APPELLANT

OPINION BELOW

The only opinion in this case was that of the Municipal Court of the City of New York (R. 28-35), which has not been reported. The Appellate Term of the Supreme Court of the State of New York affirmed, without opinion.

JURISDICTION

The judgment of the Appellate Term of the Supreme Court of the State of New York was entered on June 28, 1940 (R. 41). Leave to appeal therefrom to the Appellate Division of the Supreme Court of the State of New York was denied by the Appellate Term on August 12, 1940 (R. 43) and by the Appellate Division on October 9, 1940 (R. 44). The appeal to this Court was allowed by Mr. Justice Stone on October 11, 1940 (R. 47). On October 24, 1940, the appellee filed a motion which in the alternative asked (1) that the appeal be dismissed on the ground that it involved no substantial Federal question; or (2) that the judgment of the court below be affirmed on the ground that the question involved is so wanting in substance as not to require further argument. On December 16, 1940 this Court noted probable jurisdiction.

The jurisdiction of this Court was invoked under Section 237 of the Judicial Code, as amended by the Act of February 13, 1925, Chapter 229, Section 1 (43 Stat. 936, 937; 28 U. S. C. §344).

STATUTES INVOLVED

Section 20a of the Interstate Commerce Act, as amended by Transportation Act, 1920 (41 Stat. 494, §439; 49 U. S. C. §20a), upon which appellant relies, reads in part as follows:

> "Sec. 20a (1) That as used in this section the term 'carrier' means a common carrier by railroad (except a street, suburban, or interurban electric railway which is not operated as a part of a general steam railroad system of transportation) which is

subject to this Act, or any corporation organized for the purpose of engaging in transportation by railroad subject to this Act.

(2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

* * *

(7) The jurisdiction conferred upon the Commission by this section shall be exclusive and plenary, and a carrier may issue securities and assume obligations or liabilities in accordance with the pro-

visions of this section without securing approval other than as specified herein.

* * *

(11) Any security issued or any obligation or liability assumed by a carrier, for which under the provisions of this section the authorization of the Commission is required, shall be void, if issued or assumed without such authorization therefor having been first obtained, or if issued or assumed contrary to any term or condition of such order of authorization as modified by any order supplemental thereto entered prior to such issuance or assumption; but no security issued or obligation or liability assumed in accordance with all the terms and conditions of such an order of authorization therefor as modified by any order supplemental thereto entered prior to such issuance or assumption, shall be rendered void because of failure to comply with any provision of this section relating to procedure and other matters preceding the entry of such order of authorization. * * *"

Section 143 of the New York Railroad Law (Consolidated Laws of New York, Chap. 49, §143) upon which the appellee relies reads as follows:

"The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it. * * *"

STATEMENT

This was an action brought on July 20, 1939 by the appellee in the Municipal Court of the City of New York to recover from the appellant the face amount of five unpaid interest coupons due April 1, 1939 on $5,000 principal amount of First Mortgage 5% Gold Bonds, due 1945, issued in 1895, in an aggregate principal amount of $2,500,000, by The Northern Ohio Railway Company, and allegedly guaranteed prior to issuance both as to principal and interest coupons by The Lake Erie and Western Railroad Company.

By its complaint and motion for summary judgment appellee sought to recover against appellant on the ground that it is a consolidated railroad corporation, formed in 1923 by the consolidation of The Lake Erie and Western Railroad Company and four other railroad companies (not including The Northern Ohio Railway Company); and that by virtue of Section 143 of the Railroad Law of New York (pursuant to which law, among others, the consolidation was effected) the obligations of The Lake Erie and Western Railroad Company with respect to this guaranty attached to appellant (R. 1-5, 11).

Appellant by answer and cross-motion for summary judgment contended that under Section 20a of the Interstate Commerce Act (enacted in 1920), to which it is subject, no such guaranty obligation has been or can be attached to or assumed by it in the absence of the express authorization of the Interstate Commerce Commission; and that if Section 143 of the Railroad Law of New York

be construed to impose such obligation upon the appellant in the absence of such authorization, it is repugnant to Section 20a and therefore inoperative (R. 21). The record shows (R. 19, 23, 27) that the Interstate Commerce Commission has never authorized appellant to assume the guaranty obligations here involved. It is undisputed that they have never been expressly assumed by the appellant.

The Municipal Court granted summary judgment for the appellee (R. 35). The judgment of the Municipal Court was affirmed on appeal by the Appellate Term of the Supreme Court of the State of New York, the highest court of the state in which a decision could be had (R. 41).

SPECIFICATION OF ERRORS TO BE URGED BY THE APPELLANT

The court below erred:

(1) In holding that Section 143 of the Railroad Law of New York, as applied to the facts of this case, was not repugnant to Section 20a of the Interstate Commerce Act (R. 46);

(2) In holding that Section 20a of the Interstate Commerce Act did not forbid the imposition by Section 143 of the New York Railroad Law, upon interstate carriers consolidated under the laws of New York, of obligations in respect of the securities of their constituent companies, the assumption of which obligations had not been approved by order of the Interstate Commerce Commission as provided in said Section 20a (R. 46).

SUMMARY OF ARGUMENT

Section 20a (2) makes it unlawful for any carrier to issue any security or "*assume* any obligation or liability as * * *guarantor * * * or otherwise in respect of the securities of any other person * * * even though permitted by the authority creating the corporation * * * unless and until * * * the Commission by order authorizes such issue or assumption." (Italics supplied.) Any obligations assumed without such authority are made void by Section 20a (11). The question presented is whether the word "assume" as used in Section 20a includes the attachment of constituents' obligations to a consolidated corporation upon its consolidation under state law.

The generally accepted meaning of the word "assume" includes the attachment of obligations pursuant to the consolidation laws of a state. Judges and lawyers have always spoken of liabilities so attaching as liabilities which are "assumed" by the consolidated corporation. This Court, in speaking of a statute similar to the consolidation law here involved, said that by virtue of the statute "the new company formed by the act of consolidation assumed all of the obligations of the old company * * *." *Bailey* v. *Railroad Co.*, 22 Wall. 604, 630 (See also cases cited *infra*, p. 11).

The related provisions of Section 20a also indicate that it was the intention of Congress to give the Interstate Commerce Commission plenary and exclusive powers of regulation over all obligations with respect to the securities of carriers, including those assumed by a corporation upon consolidation.

An examination of the legislative history of Section 20a shows that Congress was specifically aware of the evils which had resulted from the assumption of obligations upon the consolidation of railroad corporations and intended that the broad inhibitions of the section should include such assumptions.

The administrative construction placed upon Section 20a by the Interstate Commerce Commission also supports the view of the appellant that the word "assume" as used in that section includes the attachment of obligations to a consolidated corporation upon its consolidation under state law.

ARGUMENT

Section 20a of the Interstate Commerce Act makes it unlawful for a carrier to assume any obligation in respect of securities unless and until the Interstate Commerce Commission authorizes such assumption; and the attachment of obligations and liabilities of constituents to a consolidated corporation, pursuant to state laws, is an assumption within the meaning of that section.

Section 20a (2) of the Interstate Commerce Act (*supra*, p. 3) makes it unlawful for any carrier to issue any security or "to assume any obligation or liability as * * * guarantor * * * or otherwise, in respect of the securities of any other person * * * even though permitted by the authority creating the corporation, unless and until * * * the Commission by order authorizes such issue or assumption."

Section 20a (11) (*supra*, p. 4) makes any such obligation or liability assumed by a carrier void if authorization for such assumption is not first obtained from the Interstate Commerce Commission.

Appellant was organized as a railroad corporation for the purpose of engaging in and is engaged in interstate transportation by railroad (R. 18), and so at all times since its incorporation it has been a carrier within the meaning of Section 20a of the Interstate Commerce Act.

Appellant has never been authorized by the Interstate Commerce Commission to assume the guaranty obligations of its constituent, The Lake Erie and Western Railroad Company (R. 19, 23, 27); and it is undisputed that the appellant has never expressly assumed these obligations (R. 21, 23, 27).

1. *The meaning of the word "assume"*

The appellee contended and prevailed below on the ground that obligations and liabilities with respect to securities which attach by virtue of consolidations under the Railroad Law of New York (particularly Section 143 thereof) are not obligations or liabilities "assumed" as that term is used in Section 20a. The court below reasoned that the word "assume" connotes a voluntary action; that the attachment of liability under Section 143 of the Railroad Law of New York is not voluntary; and that, therefore, it is not within the purview of "assumptions" under Section 20a.

We submit that this reasoning is not sound. Were it not for Section 20a, it is clear that upon consolidation the liabilities and obligations of the constituent companies would have attached to the consolidated company as the result of voluntary action. In this case the consolidation was effected, under statutes of five states, by and pursuant to a written Agreement and Articles of Consolidation.

This agreement was not formally executed by appellant, but only by its constituent corporations. Nevertheless, just as a certificate of incorporation, executed by incorporators and not by the corporation thereby created under the laws of a single state, is, together with the applicable provisions of such laws, the charter of that corporation and a contract between it and the state, so said Agreement and the applicable provisions of the laws of any one of the said five states became, in that state, appellant's charter and a contract between it and the state. Just as a corporation assumes the obligations of its certificate of incorporation, including the applicable rules of law, by commencing to do business as a corporation, so the appellant voluntarily assumed the obligations to which it became subject under the consolidation agreement and applicable law, by commencing to do business as a consolidated corporation. Of this contract between the appellant and the State of New York, Section 143 (to the extent that it had not been superseded by Section 20a) was, therefore, a part—so that appellant thereby took upon itself (to that extent) by voluntary action, the debts and liabilities of its constituent corporations. Even, therefore, if Section 20a has application only to obligations voluntarily assumed, it clearly applies to an assumption pursuant to Section 143, for the nature of such an assumption is in fact voluntary.

In the second place, even if the attachment of obligations provided for in Section 143 be not viewed as entirely voluntary in its nature, we submit that it is nevertheless an "assumption" as that term is commonly understood

in legal parlance. Judges and lawyers have always spoken of liabilities which attach to consolidated corporations by virtue of state laws as being liabilities "assumed" by them. This Court in speaking of an earlier New York statute similar to Section 143 of the Railroad Law said that by virtue of the statute "the new company formed by the act of consolidation assumed all of the obligations of the old company * * *" and that it was decided in *Prouty* v. *Lake Shore & Michigan Southern Railway Co.*, 52 N. Y. 363 (1873) that "the consolidated company in such a case becomes responsible for the debts and liabilities of the old company only by virtue of the assumption of those obligations as part of the terms of consolidation." *Bailey* v. *Railroad Company*, 22 Wall. 604, 630 (1874). So too, in *Polhemus* v. *Fitchburg R. R. Co.*, 123 N. Y. 502, 509 (1890), the New York Court of Appeals spoke of "the debts and liabilities, which are assumed by the new corporation" under such a statute. Other courts have also described the attachment of obligations under similar consolidation laws as "assumptions".

See:

Paine v. *Lake Erie Louisville R. Co.*, 31 Ind. 283, 349 (1869);

Jeffersonville, Madison & Indianapolis R. Co. v. *Hendricks*, 41 Ind. 48, 61 (1872);

Louisville, New Albany & Chicago Ry. Co. v. *Boney*, 117 Ind. 501; 20 N. E. 432, 433 (1889);

Snyder v. *New York, Chicago & St. Louis R. Co.*, 118 Ohio St. 72, 77; 160 N. E. 615, 617 (1928);

Toledo, St. Louis & Kansas City R. Co. v. *Continental Trust Co.*, 95 Fed. 497, 522, 524 (C. C. A. 6th, 1899);

Wabash, St. Louis & Pacific Ry. Co. v. *Ham*, 114 U. S. 587, 595 (1885).

As an example of the commonly accepted meaning of the term "assume" among lawyers, we need go no further than to point out that appellee's complaint in the very case at bar alleges that the liability in question was "assumed" (R. 1-5).

Appellant's position is supported not only by the current legal usage of the term "assume" but also by analysis and consideration of the context and purpose of the related provisions of Section 20a.

2. *Related provisions of Section 20a*

The several related provisions of Section 20a indicate that it was the intention of Congress to give the Interstate Commerce Commission plenary and exclusive powers of regulation with respect to the security obligations of carriers.[1]

Section 20a (7) (*supra*, p. 3) expressly declares the jurisdiction of the Commission to be "exclusive and plenary". Any securities issued or obligations with respect to securities assumed without approval of the Commission are declared to be "void". Indeed, even if approval of the Commission is obtained, such issues or assumptions are prohibited and made void if not made in accordance with all the terms and conditions of the order of authorization.

[1]See discussion in Shartman, *The Interstate Commerce Commission*, vol. 1, pp. 91-94, 191-193.

Only the issuance of short-term notes maturing within not more than two years and aggregating not more than 5% of the par value of the carrier's outstanding securities does not require prior approval of the Commission; and even as to such short-term notes carriers must keep the Commission promptly and fully informed (Section 20a (9), (10)).

If the obligations with respect to securities involved in the case at bar are not within the purview of Section 20a, they appear to be the only class of obligations not brought within the control of the Commission by the statute. It does not seem possible that Congress should have made provisions for such relatively inconsequential obligations as short-term notes for an aggregate of less than 5% of the carrier's outstanding securities and yet have made no provision whatever for the regulation or control of the much greater obligations which might attach by virtue of consolidations under state law.

Section 20a (2) sets up the factors to be taken into consideration by the Commission upon application for leave to issue securities or assume obligations with respect thereto. The Commission must find: (1) that the transaction is for some lawful object within the carrier's corporate purposes; (2) that it will be "compatible with the public interest"; (3) that it is "necessary or appropriate for or consistent with the proper performance * * * of service to the public as a common carrier"; and (4) that it will not "impair its ability to perform that service." Given such a broad grant of power with standards so explicitly related to the public interest, we submit that Congress

could not have intended that a large class of obligations with respect to securities, without regard to their effect upon the public interest, should be outside the purview of the statute merely because they attached to the carrier upon its consolidation under state laws.

It would be a mockery for the Interstate Commerce Commission carefully to consider whether a railroad shall be permitted to assume a single obligation with respect to securities, if without reference to the Interstate Commerce Commission and without being subject to its approval, a group of railroads could be consolidated under state laws and the consolidated railroad be burdened with a mass of such obligations, fixed and contingent, of the weaker roads consolidated. We submit that Congress intended no such result; and Section 20a should not be so construed.

3. *The purpose of the legislation*

An examination of the legislative history of Section 20a confirms the view that the issuance of securities and the assumption of obligations with respect to securities upon consolidation were intended by Congress to be within the purview of Section 20a.

Section 20a was added to the Interstate Commerce Act by the Transportation Act, 1920. In submitting the Transportation Act, 1920 to the House of Representatives, Mr. Esch, the Chairman of the Committee on Interstate Commerce, made the following statement with regard to what is now Section 20a:

> "In section 437 we cover what is known as the stock and bond features of the bill. The House is familiar with this part of the bill, because on three

prior occasions it has adopted almost this identical legislation: First, in 1910 when we had this provision attached to the Mann-Elkins Act of that year; again, in 1914, when the House passed the bill containing provisions now contained in this bill; again, in 1916, when the gentleman from Texas (Mr. Rayburn) presented in a bill the same provisions we are now about to consider. His bill was reported favorably by the committee and passed by an overwhelming vote. All three of these efforts of the House failed in the Senate.

"If our bill of 1914—and perhaps of 1910, but especially of 1914—had been enacted into law, in my opinion we would not have had the shameful financial record of the Frisco, the Rock Island, the Pere Marquette, and the New Haven, had we given the commission the power we seek to give it now. Hereafter, under this bill there shall be no issue of stocks or bonds without a certification from the commission that they are necessary and needful in the public interest" (58 Cong. R. 8317-8318).

The financial history of the railroads to which Mr. Esch referred shows that one of the evils of their operations was the issuance of excessive amounts of securities or the assumption of excessive security obligations in order to acquire new lines. (See for example, *Financial Investigation of N. Y., N. H. & H. R. R. Co.*, 31 I. C. C. 32, at pages 41-43 (1914); *St. Louis and San Francisco Railroad Investigation*, 29 I. C. C. 139, at page 150 (1914).)

Obviously there are a number of ways in which a railroad may issue an excessive amount of securities or assume excessive security obligations in order to acquire new lines. For example, the securities may be issued or the obligations

assumed as the result of the purchase of physical properties or stock, or of a merger or consolidation. The legislative history referred to by Mr. Esch reveals that Congress was cognizant of all these possibilities and that Section 20a was designed to guard against them.

It also appears that Congress was aware of the specific problem presented by corporate consolidations. Thus, in the Mann-Elkins Bill of 1910 referred to by Mr. Esch, the assumption of liabilities of constituents by consolidated corporations was specifically adverted to. This Bill contained two specific pertinent provisions: Section 16 which required the approval of the Interstate Commerce Commission as a prerequisite to the issuance of securities generally; and Section 17 which required the approval of the Commission as a prerequisite to the issuance of securities in connection with reorganizations and *consolidations in which the consolidated company assumed the liabilities of its constituents.* The provision dealing with the latter situation reads as follows:

> "*In case two or more railroad corporations subject to the provisions of this Act, as amended, shall be consolidated or merged pursuant to the laws of a State or States applicable thereto,* and such consolidation or merger shall consist in uniting the organizations, properties, businesses, and stocks of said corporations; and if the Interstate Commerce Commission shall have ascertained and stated in a certificate issued by it * * * that the stock to be issued by such consolidated *corporation and the bonds and other obligations, if any, to be assumed and issued thereby* does not exceed the fair estimated value of the properties of such consolidated corporation.

> nothing in this Act contained shall be deemed to prohibit the issue of such stock and bonds and other obligations, or any of them, *or the assumption of all or any of the bonds or other obligations of the corporations so consolidated* or merged" (61st Congress, 2d Session, H. R. 17536). (Italics supplied.)

In so far as the Mann-Elkins Act was concerned with assumptions of obligation, it dealt only with such assumptions as resulted from the consolidation of railroad corporations. In the subsequent bills referred to by Mr. Esch and in Section 20a of the Interstate Commerce Act, this limitation was removed and the prohibitions against assumptions of obligations were broadened to include assumptions of any obligations or liabilities "as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial" —plainly without regard to whether such assumptions were the result of consolidations or other transactions.

Thus it appears (1) that in Section 20a Congress adopted language which it intended to embrace any assumption of obligation with respect to securities, and (2) that in using this broad language Congress was aware of the evil which had resulted from the assumption of obligations upon the consolidation of railroad corporations and intended that its broad language should include such assumptions.

This Court, in speaking of the purpose of Section 20a, has well said:

> "The purpose of Congress to prevent interstate carriers from incurring expense which will lessen their ability to perform well their interstate func-

> tions is further shown in §439 of the Transportation Act, whereby the Interstate Commerce Act is amended by insertion of §20a. This new section subjects to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all future shares of stock, bonds or other evidence of indebtedness and forbids approval unless the Commission shall find that their issue is for a lawful purpose, is compatible with the public interest, is appropriate and necessary to the discharge of its public duty as a common carrier and will not impair its ability to perform that service. This is of course *in pari materia* with the restriction of paragraph 21 of §402 [i.e. Section 1 (18) of the Interstate Commerce Act] to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties." *Railroad Commission* v. *Southern Pacific Company*, 264 U. S. 331, 347 (1924).

If the purpose of the relevant provisions of Section 20a is, as this Court has said, "to prevent a possible impairment of the financial ability of interstate carriers to discharge their interstate commerce duties" the statutory prohibition against assumptions without leave of the Interstate Commerce Commission must have been intended by Congress to extend to the obligations which it is claimed the appellant here assumed. Certainly the financial ability of interstate carriers to discharge their interstate commerce duties may be affected quite as much by a mass of obligations in respect of securities which attach to them by virtue of consolidations under state laws as by obligations expressly assumed thereafter.

(4) *Administrative and judicial construction*

The administrative construction placed upon Section 20a by the Interstate Commerce Commission supports the view of the appellant that the word "assume" as used in Section 20a includes obligations which attach to a consolidated corporation by virtue of its consolidation under state consolidation laws.

In *Assumption of Obligations by L. S. & I. R. R.*, 86 I. C. C. 640 (1924), the Commission granted to a consolidated carrier formed under the consolidation laws of the State of Michigan authority to assume obligations and liabilities in respect of the securities of its two constituent companies, saying:

> "* * * Under the agreement [of consolidation] and the laws of Michigan the debts, liabilities and duties of the last two companies named [the constituent companies] attach to the applicant and are enforcible against it to the same extent and in the same manner as if originally incurred by it. The applicant accordingly seeks authority to assume obligation and liability in respect of the securities of these companies" (p. 640).

The fact that in the *L. S. & I. R. R.* case the Commission assumed jurisdiction and entered an order approving such attachment constitutes a construction of the statute which directly supports the position for which we contend. To be sure, in the *L. S. & I. R. R.* case there was an express provision in the agreement of consolidation which provided that the obligations of the constituent companies should attach to the consolidated corporations pursuant to the state consolidation law. In the case at bar, there was no

such express provision but clearly, subject to Section 20a, such a provision must necessarily be implied in any agreement of consolidation and no difference in result can be predicated upon the fact that in the one case the operation of the state consolidation law was expressly incorporated by reference and in the other case was left to implication. Clearly this is a holding that the word "assumption" as used in Section 20a includes the attachment of obligations whether such attachment results from the consolidation of corporations pursuant to state law or by reason of an agreement of consolidation which expressly provides for such attachment.

The Commission has, in fact, indicated that it does not believe that by virtue of the state statutes personal liability was imposed upon appellant in respect of security obligations of its constituents. Several years after the consolidation, the Commission, on application, granted appellant authority to assume various other such obligations. (See, for example, *New York, C. & St. L. R. Co. Assumption of Obligation*, 217 I. C. C. 598 (1936); *New York, C. & St. L. R. Co. Bonds and Assumption*, 221 I. C. C. 772 (1937).

We respectfully submit that this construction should be followed. It is supported by the language of the Section and by the legislative history. This Court has repeatedly indicated that great weight should be given to the construction consistently given to a statute by a department or Commission charged with its administration "and such construction is not to be overturned unless clearly wrong or unless a different construction is plainly required."

United States v. *Jackson*, 280 U. S. 183, 193 (1930);

United States v. *American Trucking Associations*, 310 U. S. 534, 549 (1940);

Armstrong Paint & Varnish Works v. *Nu-Enamel Corp.*, 305 U. S. 315, 330 (1938);

United States v. *Madigan*, 300 U. S. 500, 505 (1937) and cases therein cited.

The judicial constructions of Section 20a on the precise point here involved are very few. Indeed, we know of only two cases other than that at bar: *Friedman* v. *New York, Chicago & St. Louis Railroad Company* (N. Y. Supreme Court, N. Y. County, Special Term, N. Y. L. J. April 17, 1940, p. 1740); and *Missouri-Kansas-Texas Ry. Co.* v. *Mars*, 294 S. W. 941 (Tex. Civ. App. 1927).

In the *Friedman* case, the Special Term of the New York Supreme Court (a court of first instance) followed the decision of the court below in the case at bar and granted summary judgment to the plaintiff on much the same reasoning. Our appeal from this decision is now pending in the state courts.

The *Mars* case involved a Texas statute which provided that in case of the sale of the property and franchises of a railroad, the property and franchises so purchased should be "charged with and subject to" all subsisting liabilities of the seller for damage to property. The Texas Court of Civil Appeals held (1) that this statute provided for the assumption of such liabilities by operation of law, and (2) that the plaintiff must allege in his complaint that the assumption was authorized by the Interstate Commerce Commission. The decision of the Texas Court is there-

fore a direct holding that no liability attaches by operation of state law unless and until the assumption of liability is expressly authorized by the Commission.

While this decision was reversed by the Texas Commission of Appeals (298 S. W. 271 (1927)) and this judgment of reversal was affirmed by the United States Supreme Court (278 U. S. 258 (1929)), the reversal was on other grounds, leaving unaffected the Texas Court of Civil Appeals' conclusion as to the point here involved.

Despite the paucity of authority precisely in point, the decision of this Court in the closely analogous case *Railroad Commission* v. *Southern Pacific Company*, 264 U. S. 331 (1924), supports our position. There this Court had occasion to consider the meaning of Section 1 (18) of the Interstate Commerce Act, which provides:

> "* * * no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, * * * unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, * * *" (41 Stat. 477).

The California State Railroad Commission had ordered the defendant interstate railroads to establish a new union terminal and to construct lines leading to that terminal. No application was ever made to the Interstate Commerce Commission under Section 1 (18). This court held that the California Commission's order was inoperative until

the Interstate Commerce Commission acted under Section 1 (18).

The facts in the *Southern Pacific* case seem analogous to those in the case at bar. There the statute forbade the railroad to "undertake" certain construction without the approval of the Interstate Commerce Commission. Here Section 20a forbade the railroad to "assume" obligations in respect of securities without the authorization of the Interstate Commerce Commission. In each case the duty or obligation of the railroad was imposed by state authority. If the involuntary origin of the duty in the *Southern Pacific* case was not enough to remove it from the exclusive jurisdiction of the federal agency over "undertakings" it follows that even if the present defendant's "assumption of liability" be viewed as in a sense involuntary, that would not remove it from the exclusive jurisdiction of the federal agency over "assumptions" of security obligations.

The *Southern Pacific* case is but one of many in which this Court and other courts have held that state statutes regulating interstate carriers, which are in similar conflict with the policy of Section 20a and other provisions of the Interstate Commerce Act, must yield to the paramount regulatory power of Congress. *New York Central Securities Corp.* v. *United States*, 54 F. (2d) 122 (S. D. N. Y., 1931), aff'd 287 U. S. 12 (1932); *Texas* v. *United States*, 292 U. S. 522 (1934); *People* v. *New York Central R. Co.*, 233 N. Y. 679 (1922); *Whitman* v. *Northern Central Ry. Co.*, 146 Md. 580, 127 Atl. 112 (1924).

CONCLUSION

For the reasons stated and on the authority of the cases cited above, we respectfully submit that the judgment of the lower court should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 586 15

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

v.

DOROTHEA T. FRANK,

Appellee.

ON APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

REPLY BRIEF FOR APPELLANT

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REPLY BRIEF FOR APPELLANT

This brief is submitted in reply to those contentions advanced in the brief of the appellee which were not considered in appellant's main brief. It is unnecessary to reply to Point II of the appellee's brief, since the motion to dismiss the appeal, referred to therein as pending, has been denied.

Appellee's Contention That Appellant's Construction of Section 20a Will Deprive Appellee of Property Without Due Process of Law.

The appellee argues (Appellee's brief, pp. 6, 7) that the construction of Section 20a urged by appellant would deprive the appellee of her property without due process of law. We submit that this suggestion lacks substance.

In fact it can be affirmatively demonstrated from the record that the appellee and other bondholders are not deprived of any substantial rights or remedies which they at any time had by reason of the guaranty of The Lake Erie & Western Railroad Company. The appellee seems to admit (Appellee's brief, p. 6) that ever if appellant's contention be sustained appellee would have a remedy in equity against the assets of The Lake Erie & Western which can be traced into the hands of appellant. *Railroad Company* v. *Howard*, 7 Wall. 392 (1868). Such a remedy is given in equity on the theory that the appellant took the assets of its constituent companies subject to a trust in favor of their creditors. Under this theory the appellee could reach in equity all the assets of The Lake Erie & Western Railroad Company which the holders of the bonds and coupons could have reached if the consolidation had not occurred.

The appellee cites two New York cases[1] (Appellee's brief, p. 7) holding that, following a consolidation, actions upon liabilities of the constituent companies must be

[1] *Cameron* v. *United Traction Co.*, 67 App. Div. 557, 73 N. Y. Supp. 981 (1st Dept., 1902), and *Lee* v. *Stillwater & Mechanicville Street Ry. Co.*, 140 App. Div. 779, 125 N. Y. Supp. 840 (3rd Dept., 1910).

brought against the consolidated company and cannot be brought against the constituents. The ground of decision was that the liabilities of the constituent companies had attached to and become binding upon the consolidated company and the consolidation statute under such circumstances gave an exclusive and adequate remedy against the latter company. These cases were decided prior to the enactment of Section 20a of the Interstate Commerce Act. If, as appellant contends, Section 20a operated to prevent the attachment to the appellant of the guaranty obligation of The Lake Erie & Western Railroad Company, the reasoning of the courts in the above cases would have no application and under such circumstances it is possible that the New York courts would permit actions to be brought against The Lake Erie & Western, which under Section 143 is deemed to continue in existence to preserve creditors' rights. *Gale* v. *Troy & B. R. Co.*, 4 N. Y. Supp. 295 (Gen. Term, 3rd Dept., 1889).

The appellee has, therefore, substantially all the rights and remedies which she would have had in the New York courts if the consolidation had not occurred. She is, in the case at bar, actually claiming rights (under Section 143) which are additional to those contained in the guaranteed bonds held by her. Such additional rights she cannot have, because the state statute under which she claims them is inoperative by reason of its repugnancy to Section 20a. The mere fact that in the interest of the regulation of interstate commerce Congress has limited appellee to her original contractual rights on the guaranty against The Lake Erie & Western Railroad Company and its assets does not deprive her of property without due process of law.

Cases of the Interstate Commerce Commission Relied Upon by Appellee.

In its main brief[2] the appellant has shown that the Interstate Commerce Commission has construed Section 20a as applying to the attachment of obligations with respect to securities to a consolidated corporation upon its consolidation under state law (B. 19-23). The appellee does not dispute the holding of the Commission in any of the cases cited by appellant. She argues, however, that two of the cases cited are distinguishable and that in certain others the Commission has suggested that Section 20a has no application to the attachment of obligations with respect to securities to a consolidated company upon its consolidation pursuant to state law.

The appellee attempts to distinguish the holdings in *New York, C. & St. L. R. Co. Assumption of Obligation*, 217 I. C. C. 598 (1936) and *New York, C. & St. L. R. R. Co. Bonds and Assumption*, 221 I. C. C. 772 (1937), upon the ground that both related to the assumption of liability under agreements extending the maturity dates of mortgage bonds of constituent companies and that they therefore involved not merely the question of the assumption of the old obligation of constituent companies but also the issuance of "new evidences of debt." The fact is, however, that in each the Commission specifically authorized both the proposed extension and "the proposed assumption of obligation and liability as primary obligor in respect thereof, by The New York, Chicago and St. Louis Railroad Company" (221 I. C. C. 772, 774; see also 217 I. C. C. 598, 600).

[2] Hereinafter referred to as B.

The appellee also argues from these cases that prior to the applications to the Commission the appellant had paid the interest due upon these bonds and that such payments showed that the appellant deemed it unnecessary to obtain the prior authorization of the Commission to any assumption of such obligations. No such inference can be drawn from the mere fact that such interest payments were made by the consolidated company. Upon consolidation, the properties of the constituent companies had vested in the appellant subject to the liens of their mortgage bonds. Unless interest on such mortgage bonds were paid, the properties of the constituent companies might have been lost to the appellant by foreclosure of the mortgages. The payment of interest by appellant under these circumstances was made merely to retain the mortgaged properties and did not constitute the assumption by it of any personal obligation on the mortgage bonds of its constituents.

The appellee also asserts that the Commission, by its language in *Assumption of Obligations by L. S. and I. R. R.*, 86 I. C. C. 640 (1924), and in three other cases,[3] indicated that it "deemed the state statutes fully effective in attaching liability irrespective of the application" (Appellee's brief, p. 9).

In *Assumption of Obligations by L. S. and I. R. R.*, *supra*, and other cases cited in our brief (B. 20) the Com-

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[3] *Pledge of Toledo, St. Louis & Western Bonds by New York, Chicago & St. Louis Railroad*, 86 I. C. C. 465 (1924);
Akron, C. & Y. Ry. Co. and *Northern Ohio Ry. Co. Reorganization*, 228 I. C. C. 645 (1938);
New York, Chicago & St. Louis R.R. Bonds, 82 I. C. C. 365 (1924).

mission granted to consolidated companies authority, under Section 20a, to assume the obligations of constituent companies which purportedly attached to the consolidated companies by virtue of state statutes. If the Commission had believed the state statutes to be effective to impose such obligations without its approval, it would, under its usual practice, have denied the applications for lack of jurisdiction.

Thus the Commission has several times dismissed applications by carriers for authority to assume obligations in respect of securities, on the ground that the action of the carrier did not constitute an assumption of obligations in respect of securities for which the approval of the Commission was required to be obtained under Section 20a, and action by the Commission was therefore unnecessary.

Southern Pacific Company Assumption of Obligation, 189 I. C. C. 212 (1932);
Missouri-K-T R. R. Co. Assumption of Obligation, 212 I. C. C. 217 (1936).

In none of the other cases relied on by appellee was the Commission confronted directly with the problem of the liability of a consolidated corporation upon its constituents' obligations in respect of securities. We respectfully submit that the language relied upon by appellee does not clearly indicate any opinion of the Commission as to the question presented on this appeal. In any event, whenever application has been made by a consolidated company for authority to assume its constituents' obligations in respect of securities, the Commission has granted such authority

and has thereby indicated its belief that state statutes were not effective to impose such personal obligations in the absence of such authorization (B. 19-20).

Appellee's Contention that the Interstate Commerce Commission approved the Assumption by Appellant of the Security Obligations Involved in this Appeal.

The appellee finally contends (Appellee's brief, pp. 12, 13) that by authorizing the appellant to operate the lines of its constituents and to issue its own capital stock in exchange for the stock of the constituent companies (*Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company*, 79 I. C. C. 581 (1923)), the Commission actually approved the assumption by the appellant of all the security obligations of its constituents. This was the situation presented in that case: At the time the appellant was consolidated the Interstate Commerce Commission had no jurisdiction to pass upon the merits of the consolidation, since Section 5 of the Interstate Commerce Act, giving it such jurisdiction, had not then become effective. *Snyder* v. *New York, Chicago & St. Louis R. R. Co.*, 278 U. S. 578 (1929). It was therefore unnecessary for the appellant to make application to the Commission for its approval of the consolidation It was, however, necessary for the appellant to apply, under Section 1 (18) and (19), for approval of the acquisition and operation by the appellant of the lines of its constituent companies, and for approval under Section 20a of the issuance of the appellant's stock in exchange for that of its constituents. The Commission's authorization under Sec-

tion 20a would also have been necessary if the appellant had assumed the obligations of its constituent companies, but since the consolidation agreement did not provide for such an assumption no authorization was necessary, and the consolidated company merely acquired the properties of the constituent companies, subject to the liens of existing mortgages upon the properties of the constituents and to equitable liens in favor of the general creditors of those companies.

It is clear from *Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company, supra,* however, and from the Commission's order entered therein that the Commission did not consider whether appellant should be authorized to assume the obligations of its constituent companies, nor in fact authorize such assumption. No application was made in that case for any such authorization and it appears from the terms of Section 20a that an authorization of the assumption of obligations must be specifically requested and specifically granted.

The only question before the Commission upon the application of appellant for authority to issue stock under Section 20a was whether such issuance by the consolidated company was compatible with the public interest and necessary and appropriate for, and consistent with, the performance by the appellant of service to the public as a common carrier. It is not the practice of the Commission to consider questions not specifically raised by an application to it, even though such questions may be within its jurisdiction upon proper application.

The only question before the Commission upon the application of the appellant for a certificate under Section 1 (18), (19), authorizing it to acquire and operate the lines of its constituents, was whether public convenience and necessity required such acquisition and operation. The decisions of the Commission clearly indicate that any assumption of obligations involved in such acquisition or operation must in addition have the specific authority of the Commission granted under Section 20a upon separate application.

Chicago, Milwaukee & St. Paul Reorganization, 131 I. C. C. 673 (1928);

Chicago, M., St. P. & P. R. Co. Acquisition, 158 I. C. C. 770 (1930);

Elmira & L. O. R. Co. Acquisition, 170 I. C. C. 127 (1931);

Pacific Coast R. Co. Securities, 189 I. C. C. 79 (1932).

Even where the Commission has approved a consolidation under Section 5 of the Interstate Commerce Act and the issuance or assumption of obligations with respect to securities is incidental to the consummation of the consolidation, separate application under Section 20a must be made for approval of such issuance or assumption by the consolidated carrier.

Rock Island System Consolidation, 193 I. C. C. 395, 403 (1933);

Illinois Term. R. Co. Consolidation and Securities, 221 I. C. C. 676 (1937).

It is thus clear that, in the view of the Commission, questions as to the issuance and assumptions of obligations in respect to securities must receive the separate consideration of the Commission upon separate application; and the contention of the appellee that any approval of the Commission can be inferred from its approval of the acquisition of the lines of the constituents and the issuance of capital stock is untenable.

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FILE COPY

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IN THE

Supreme Court of the United States

October Term, 1941

No. 15

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

v.

DOROTHEA T. FRANK,

Appellee.

On Appeal from the Appellate Term of the Supreme Court of the State of New York

ON REHEARING
REPLY BRIEF FOR APPELLANT

This brief is submitted in reply to those contentions advanced in the substitute brief of the appellee which were not considered in appellant's main brief. It replaces and supersedes appellant's former reply brief, which was directed to appellee's superseded brief. It does not, however, replace or supersede appellant's main brief.

Appellee's contention that appellant's construction of Section 20a will deprive appellee of property without due process of law

The appellee argues (Appellee's brief, pp. 6, 7) that the construction of Section 20a urged by appellant would deprive the appellee of property without due process of law. We submit that this suggestion lacks substance.

In fact it can be affirmatively demonstrated from the record that the appellee and other bondholders are not deprived of any substantial rights or remedies which they at any time had by reason of the guaranty of The Lake Erie & Western Railroad Company. The appellee admits (Appellee's brief, p. 6) that even if appellant's contention be sustained appellee would have a remedy in equity against the assets of The Lake Erie & Western which can be traced into the hands of appellant. *Railroad Company v. Howard*, 7 Wall. 392 (1868). Such a remedy is given in equity on the theory that the appellant took the assets of its constituent companies subject to a trust in favor of their creditors. Under this theory the appellee could reach in equity all the assets of The Lake Erie & Western Railroad Company which the holders of the bonds and coupons could have reached if the consolidation had not occurred.

The appellee has, therefore, substantially all the rights and remedies which she would have had in the New York courts if the consolidation had not occurred. She is, in the case at bar, actually claiming rights (under Section 143) which are additional to those contained in the guaranteed bonds held by her. Such additional rights she can not have, because the State statute under which she claims them is inoperative by reason of its repugnancy to Section 20a.

But for the express provision in Section 143 of the Railroad Law, there would be no basis for a claim that a creditor of one constituent could reach assets derived from another constituent; he could reach assets derived from his debtor and those assets only.

> *Irvine* v. *New York Edison Co.*, 207 N. Y. 425 (1913).

The effect of that provision in Section 143, while it remained in force, was to give the creditors of a constituent concurrent rights to reach the assets derived from that constituent, or to hold the consolidated corporation.

All that Congress did, when by enacting Section 20a it superseded that provision was to take away the special statutory right, leaving the common law right unimpaired.

The mere fact that in the interest of the regulation of interstate commerce Congress has limited appellee to her original contractual rights on the guaranty against The Lake Erie & Western Railroad Company and its assets does not deprive her of property without due process of law.

Cases of the Interstate Commerce Commission relied upon by appellee

In its main brief (pp. 19-23) the appellant has shown that the Interstate Commerce Commission has construed Section 20a as applying to the attachment of obligations in respect of securities to a consolidated corporation upon its consolidation under state law. The appellee does not dispute the holding of the Commission in any of the cases cited by appellant. She argues, however, that two of the cases cited are distinguishable and that in certain others

the Commission has suggested that Section 20a has no application to the attachment of obligations in respect of securities to a consolidated company upon its consolidation pursuant to state law.

The appellee attempts to distinguish the holdings in *New York C. & St. L. R. Co. Assumption of Obligation*, 217 I. C. C. 598 (1936) and *New York C. & St. L. R. R. Co. Bonds and Assumption*, 221 I. C. C. 772 (1937), upon the ground (Appellee's brief, p. 9) that both relate to assumption of liability under agreements extending the maturity dates of mortgage bonds of constituent companies and that they therefore involved not merely the question of the assumption of the old obligation of constituent companies but also the issuance of "new evidences of debt." The fact is, however, that in each the Commission specifically authorized both the proposed extension and "the proposed assumption of obligation and liability as primary obligor in respect thereof, by The New York, Chicago and St. Louis Railroad Company" (221 I. C. C. 772, 774; see also 217 I. C. C. 598, 600).

The appellee also argues (Appellee's brief, pp. 9-10) that it appears from these cases that prior to the applications to the Commission the appellant had paid the interest due upon these bonds and that such payments showed that the appellant deemed it unnecessary to obtain the prior authorization of the Commission to any assumption of such obligations. No such inference can be drawn. Upon consolidation, the properties of the constituent companies had vested in the appellant subject to the liens of their mortgage bonds. Unless interest on such mortgage bonds were paid, the properties of the constituent companies might have

been lost to the appellant by foreclosure of the mortgages. The payment of interest by appellant under these circumstances was made merely to retain the mortgaged properties and did not rest upon the assumption by it of any personal obligation on the mortgage bonds of its constituents.

The appellee also asserts that the Commission by its language in *Assumption of Obligations by L. S. and I. R. R.*, 86 I. C. C. 640 (1924), and in three other cases,[1] indicated that it "deemed the state statutes fully effective in attaching liability irrespective of the application" (Appellee's brief, pp. 7-8).

In *Assumption of Obligations by L. S. and I. R. R., supra*, and other cases cited in our main brief (p. 26) the Commission granted to consolidated companies authority under Section 20a, to assume the obligations of constituent companies which purportedly attached to the consolidated companies by virtue of state statutes. If the Commission had believed the state statutes to be effective to impose such obligations without its approval, it would, under its usual practice, have denied the applications for lack of jurisdiction.

Thus the Commission has several times dismissed applications by carriers for authority to assume obligations in respect of securities on the ground that the action of the carrier did not constitute an assumption of obligations in respect of securities for which the approval of the Commission was required to be obtained under Section

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[1] *Pledge of Toledo, St. Louis & Western Bonds by New York Chicago & St. Louis Railroad*, 86 I. C. C. 465 (1924); *Akron, C. & Y. Ry. Co.* and *Northern Ohio Ry. Co. Reorganization*, 228 I. C. C. 645 (1938); *New York Chicago & St. Louis R. R. Bonds*, 82 I. C. C. 365 (1923).

20a and action by the Commission was therefore unauthorized.

Southern Pacific Company Assumption of Obligation, 189 I. C. C. 212 (1932);
Missouri-K-T R. R. Co. Assumption of Obligation, 212 I. C. C. 217 (1936).

In none of the other cases relied on by appellee was the Commission confronted directly with the problem of the liability of a consolidated corporation upon its constituents' obligations in respect of securities. We respectfully submit that the language relied upon by the appellee does not clearly indicate any opinion of the Commission as to the question presented on this appeal. In any event, as we have shown in our main brief (pp. 19-20), whenever application has been made by a consolidated company for authority to assume its constituents' obligations in respect of securities, the Commission has taken jurisdiction and has granted such authority. In so doing, it has necessarily held that state statutes were not effective to impose such personal obligations in the absence of such authorization.

Appellee's contention that the Interstate Commerce Commission approved the assumption by appellant of the obligations involved in this appeal

The appellee contends (Appellee's brief, pp. 10, 11) that by authorizing the appellant to operate the lines of its constituents and to issue its own capital stock in exchange for the stock of the constituent companies (*Operation of Lines and Issue of Capital Stock by the New York Chicago & St. Louis Railroad Company*, 79 I. C. C. 581

(1923)), the Commission actually approved the assumption by the appellant of all of its constituents obligations in respect of securities.

It is clear from *Operation of Lines and Issue of Capital Stock by the New York Chicago & St. Louis Railroad Company, supra,* however, and from the Commission's order entered therein that the Commission did not consider whether appellant should be authorized to assume the obligations of its constituent companies, nor in fact authorize such assumption. No application was made in that case for any such authorization and it appears from the terms of Section 20a that an authorization of the assumption of obligations must be specifically requested and specifically granted.

The only question before the Commission upon the application of appellant for authority to issue stock under Section 20a was whether such issuance by the consolidated company was compatible with the public interest and necessary and appropriate for, and consistent with, the performance by the appellant of service to the public as a common carrier. It is not the practice of the Commission to consider questions not specifically raised by an application to it, even though such questions may be within its jurisdiction upon proper application.

The only question before the Commission upon the application of the appellant for a certificate under Section 1 (18), (19), authorizing it to acquire and operate the lines of its constituents, was whether public convenience and necessity required such operation. The decisions of the Commission clearly indicate that any assumption of obligations involved in such acquisition or operation must

in addition have the specific authority of the Commission granted under Section 20a upon separate application.

Chicago, Milwaukee & St. Paul Reorganization, 131 I. C. C. 673 (1928) see, especially, pp. 691-2;
Chicago, M. St. P. & P. R. Co. Acquisition, 158 I. C. C. 770 (1930);
Elmira & L. O. R. Co. Acquisition, 170 I. C. C. 127 (1931);
Pacific Coast R. Co. Securities, 189 I. C. C. 79 (1932).

Even where the Commission has approved a consolidation under Section 5 of the Interstate Commerce Act and the issuance or assumption of obligations in respect of securities is incidental to the consummation of the consolidation, separate application under Section 20a must be made by the consolidated carrier for approval of such issuance or assumption.

Grand Trunk W. R. Co. Unification and Securities, 158 I. C. C. 117 (1929);
Rock Island System Consolidation, 193 I. C. C. 395, 403 (1933);
Illinois Term. R. Co. Consolidation and Securities, 221 I. C. C. 676, 690 (1937).

In this respect, the Commission has drawn a sharp distinction between the acquisition of properties and the assumption of liabilities. In its view, authority to consolidate includes authority to acquire and operate the properties of the constituents, but does not include authority to assume their liabilities.

Rock Island System Consolidation, supra, 193 I. C. C. 395, 404 (1933);
Illinois Term. R. Co. Consolidation and Securities, supra, 221 I. C. C. 676, 691 (1937).

It is hard to see how appellee's contention that the situation may have been radically changed by the 1933 amendment to Section 5 (Appellee's brief, Point III) is germane to any issue presently before this Court. Moreover, the appellee's view of the effect of the 1933 amendments is plainly not shared by the Commission, since the cases just cited were both decided under those amendments. (See, especially, *Rock Island System Consolidation, supra*, 193 I. C. C. 395, 396).

It is thus clear that, in the view of the Commission, questions as to the issuance and assumptions of obligations in respect of securities must receive the separate consideration of the Commission upon separate application under Section 20a; and the contention of the appellee that any approval of the Commission can be inferred from its approval of the acquisition of the lines of the constituents and the issuance of capital stock is untenable.

Appellee's contention that "appellant may not assert a defense, based upon its own omission to apply for authority to assume liability"

The appellee finally contends, in substance (Appellee's brief, pp. 12-15), that the appellant is estopped to deny its liability on the guaranty, by its failure to apply, under Section 20a, for authority to assume liability thereon.

Both the express provisions and the purpose of Section 20a exclude any application of the doctrine of estoppel.[2]

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[2] The cases cited by the appellee involve an entirely different question. In two of them (*Marony* v. *Wheeling & L. E. Ry. Co.*, 33 F. (2d) 916; *Cheatham* v. *Wheeling & L. E. Ry. Co.*, 37 F. (2d) 593) the defendant, a carrier, had prior to the enactment of Section 20a, issued preferred stock convertible into common,

Cf. *Texas & Pacific Railway Co.* v. *Pottorff*, 291 U. S. 245 (1934).

By the express provision of Section 20a (11), any issuance or assumption of obligations in respect of securities, without authorization of the Commission, is void. An obligation, declared void by statute upon broad grounds of public policy, cannot be made valid by estoppel even in favor of a purchaser for value without notice of the invalidity.[3] "A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed." *Texas and Pac. Ry. Co.* v. *Leatherwood*, 250 U. S. 478, 481 (1919).

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thus assuming a valid contractual obligation to issue common stock in exchange for preferred stock duly tendered. For some seven years after Section 20a came into effect, it made no attempt to secure authority to issue the necessary common stock. At the end of that time, the conversion of preferred into common, became advantageous and demands for conversion were made by certain preferred stockholders, whereupon the carrier applied for and eventually obtained authority to issue the necessary common stock. In the meantime, conversion had ceased to be advantageous and the preferred stockholders in question sued to recover damages for the carrier's breach of its contract to exchange on demand. It set up as a defense, impossibility due to supervening illegality. The holdings were, that the impossibility was due to the carrier's failure to apply for authority to issue, and impossibility of performance due to the promisor's own act or default is not a defense to an action for breach of contract.

The third case cited by the appellee (*Murphy* v. *North American Light & Power Co.*, 106 F. (2d) 74) merely holds that where a controlling stockholder undertakes to purchase stock from a corporation, it also impliedly agrees to vote in favor of an increase in stock, if that be necessary to carry out the bargain.

In the case at bar, on the other hand, the appellant never made any promise to the appellee, nor owed her any duty. It is not asserting that it has been relieved from a liability once incurred; it is denying that it ever came under any liability at all.

[3] Section 20a (11) provides a remedy for such a purchaser. That remedy is not a right to recover as if the authorization had been given; it is a right to recover the damages occasioned by such invalidity.

If, by operation of any theory of estoppel, carriers could assume or impose upon themselves obligations in respect of securities merely by failing to apply for Commission authorization, then the carriers and not the Commission would control in such matters. Yet clearly the purpose of Section 20a was to give the Commission plenary and exclusive jurisdiction and control over the issuance and assumption of obligations in respect of securities; and thereby to prevent a possible impairment of the financial ability of carriers to discharge their interstate duties. See: *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 347 (1924).

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 586

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

DOROTHEA T. FRANK.

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

LOUIS J. VORHAUS,
Counsel for Appellee.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 586

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

DOROTHEA T. FRANK,

APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK.

STATEMENT AGAINST JURISDICTION AND MOTIONS TO DISMISS OR AFFIRM.

Dorothea T. Frank, Appellee in the above entitled case, files herewith a statement of matters and grounds making against the jurisdiction of this Court asserted by the appellant:

I. The Nature of the Case and the Ruling of the Court Below:

Appellant consolidated corporation was formed in April 1923, under the laws of five states, among them New York

(R. 25; 287). The validity of that consolidation was sustained by this Court.

Snyder v. *N. Y., C. & St. L. R. Co.*, 278 U. S. 578, 49 S. Ct. 176, affirming 118 Ohio St. 72.

§142 of the New York Railroad Law (Consolidated Laws of New York, Vol. 48, p. 157) provided:

> "Upon the consummation of such act of consolidation all the rights, privileges, exemptions and franchises of each of the corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property, rights of way, and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to such agreement and act * * *."

It is conceded that appellant did acquire the properties of its constituent companies (R. 26; 287-288).

§141, subdiv. 2, of the same law (Consolidated Laws of New York, Vol. 48, p. 156) provides:

> "* * * but such act of consolidation shall not release such new corporation from any of the restrictions, liabilities or duties of the several corporations so consolidated."

The Lake Erie & Western Railroad Company had guaranteed payment of interest coupons of the Northern Ohio bonds in October 1895 (R. 23-25; 286). This was before the enactment of §20a of the Interstate Commerce Act (U. S. C., Title 49; 41 Stat. 494; Act. Feb. 28, 1920, C. 91, §439).

When, by consolidation, The Lake Erie & Western Rail-

road Company became a constituent of appellant corporation, the latter, by virtue of the Railroad Law, §142, acquired all of the property of the former; this, as stated, is conceded.

New York Railroad Law, §143 (Consolidated Laws of New York, Vol. 48, p. 158) provides:

> "The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it * * *."

Appellee accordingly brought suit against appellant, consolidated corporation, upon the guaranty of its constituent, to recover the amount of five overdue coupons.

The court below ruled (R. 301-304) that there is no conflict between said §143 and Interstate Commerce Act §20a; that appellant did not "assume" or guarantee any debt of The Lake Erie & Western; but that the debts "attached" and became its own by virtue of the statute.

II. There is No Conflict Between §143, New York Railroad Law, and §20a of the Interstate Commerce Act:

§20a, Interstate Commerce Act (U. S. C., Title 49; 41 State 494; Act. Feb. 28, 1929, C. 91, §439), provides:

> "* * * it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed 'securities') or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in re-

> spect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that * * * the Commission by order authorizes such issue or assumption. * * *"

The purpose of the State statute is to charge the consolidated corporation and its property with the subsisting debts and liabilities of its constituent corporations and to prevent their defeat by the transfer of their property through the consolidation. §20a of the Interstate Commerce Act is not aimed at such debts and liabilities; it relates to obligations and liabilities newly created or assumed; its field of operation is wholly distinct from that covered by the State statute.

> *Missouri-Kansas-Texas R. Co.* v. *Mars*, 278 U. S. 258, 49 S. Ct. 103.

In the case cited, a railroad company, against which defendants in error had obtained judgment for damages to cattle, was reorganized after sale by a receiver. The State statute provided that the property and franchise so purchased should be charged with and subject to the payment of all subsisting claims, among others, for loss of or damage to property sustained in the operation of the railroad by the sold out company. The action was brought to recover the amount unpaid upon the judgment and to foreclose a lien therefor which defendant in error claimed to have, under the statute, upon the railroad properties so acquired. This Court affirmed judgment for defendant in error, holding it required no discussion or citation of authority to show that there was no conflict between the State statute and the provisions of §20a of the Transportation Act relative to assumption of liability.

No new obligation was here "assumed" by appellant; the liability had been created by The Lake Erie & Western

R. R. Co.; and as an existing obligation of one of its constituents "attached" to the consolidated corporation. Appellant's liability is not predicated upon any "assumption" under §20a, but upon the fact that the rights of creditors of the constituent corporations were preserved by consolidation under §143. It was not a guarantee which appellant "assumed" but an old liability which "attached" to it.

Friedman v. *N. Y. C. & St. L. R. R. Co.*, New York Law Journal April 27, 1940, at p. 1740 (per Rosenman, J.).

The argument that if §20a is construed as it has been by the State courts, the Commission was at that time powerless to prevent interstate carriers from undertaking heavy security obligations as the result of consolidation, is without force. In the first place, the State statutes, relative to consolidation and its incidents had not been superseded by Congressional Act.

Snyder v. *N. Y. C. & St. L. R. R. Co.*, 278 U. S. 578, 49 S. Ct. 176.

Further, because the obligations attaching to the consolidated corporation were but the sum total of the existing obligations of its constituents.

Again, when application was made to the Commission by this appellant consolidated corporation for authority to operate the lines of its constituents and to issue its own capital stock in exchange for the capital stock of its constituents, pursuant to the Articles of Consolidation (R. 26; 287), the Commission was apprised and was fully aware of the provisions of the applicable State statutes by the terms of which the liability of its constituent corporation attached to the consolidated corporation. This is clearly shown by the opinion which the Commission rendered.

Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company, 79 I. C. C. 581, 585 (June 18, 1923).

It is fair to assume, therefore, that when the Commission granted to appellant the authority to operate the lines and issue its stock in exchange for the stock of its constituents, it necessarily approved the conditions under which the consolidation was effected, including the attaching to the new company of the liabilities of its constituents; for by the provisions of §20a (2) the Commission could make the order only if it found that such issue was "compatible with the public interest * * * necessary or appropriate for or consistent with the performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service".

That the Commission understood the effect of the authorization which it granted is also clear from its later opinion:

> "It appears that the consolidation was completed on April 11th, 1923, and that the new company is now vested with the property, rights and franchises of the Nickel Plate and other constituent companies, subject to all their debts, obligations and liabilities."
>
> *New York, Chicago & St. Louis R. R. Bonds*, 82 I. C. C. 365.

Obviously, appellant likewise fully understood that it was charged with liability, which attached by the consolidation, upon the debts of its constituents. For, significantly, while it did apply, as it was bound to do, for authority to issue its own shares in exchange for those of its constituents, because a new issue was involved (R. 26), it did not apply for authority to assume liability upon the guaranties (R. 49); clearly not to escape or evade such liability, but because the liability "attached" and authorization was unnecessary. Certainly, § 20a does not confer upon the consolidated corporation any discretion to reject or repudiate any debt or liability which had been incurred prior to the consolidation by any of the constituent corporations.

In *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 44 S. Ct. 376, the opinion made reference to future issues and did not relate to liabilities which attached through consolidation.

Subsequent to the decision in the *Snyder* case, by §5, Subdiv. (4), of the Interstate Commerce Act, as amended, (Act June 16, 1933, C. 91, §202), the Federal Government took possession of the field so far as relates to the consolidation of interstate carriers, superseding the State statutes, thenceforth, as to such consolidations. So, as to such consolidations as may have been effected since that amendment, the question here presented cannot arise.

If §20a were to be construed as requiring the authorization of the Interstate Commerce Commission in such a situation as here presented, where the consolidated corporation has acquired all of the property of its constituents, then, clearly, the creditors of the constituent corporations are deprived of their rights and property, without due process of law, and this, of course, may not be done even in the regulation of commerce.

United States v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 327; 51 S. Ct. 159.

The contention of appellant is without merit; it is disposed of by *Missouri-Kansas-Texas R. Co.* v. *Mars*, 278 U. S. 258, 49 S. Ct. 103.

Therefore, on the ground that the question involved is of such an unsubstantial character as to be devoid of all merit and therefore frivolous, the appellee moves to dismiss the appeal.

Deming v. *Carlisle Packing Co.*, 226 U. S. 102, 33 S. Ct. 80;

Wick v. *Chelan Electric Co.*, 280 U. S. 108, 111; 50 S. Ct. 41;

Seaboard Air Line v. *Watson*, 287 U. S. 86, 92; 53 S. Ct. 32.

In the alternative, on the ground that the question on which the decision depends is so wanting in substance as not to need farther argument, the appellee moves to affirm the judgment below.

Hodges v. *Snyder*, 261 U. S. 600, 601; 43 S. Ct. 435.
Boston v. *Jackson*, 260 U. S. 309, 314; 43 S. Ct. 129.

Respectfully submitted,

(Sgd.) Louis J. Vorhaus,
Counsel for Appellee.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 586

Now comes the Appellee, Dorothea T. Frank, and moves to dismiss the appeal herein, on the ground that the case presents no substantial Federal question; and further moves, if the motion to dismiss is not granted, that this Court affirm the decision of the New York Court, on the ground that the question on which the decision of this cause depends is so unsubstantial as to need no further argument, all as appears in the statement of grounds making against the jurisdiction of this Court filed herewith.

(Sgd.) LOUIS J. VORHAUS,
Counsel for Appellee.

Supreme Court of the United States

October Term, 1940

No. 586

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

DOROTHEA T. FRANK,

Appellee.

MOTION BY APPELLEE TO DISMISS

LOUIS J. VORHAUS,
Counsel for Appellee.

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Supreme Court of the United States

October Term, 1940

No. 586

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

DOROTHEA T. FRANK,

Appellee.

MOTION BY APPELLEE TO DISMISS

Now comes the appellee, Dorothea T. Frank, and moves to dismiss the appeal herein, on the ground that the appeal (R. 47) is improperly directed to the Appellate Term of the Supreme Court of the State of New York, First Department, instead of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District.

This ground has not already been advanced in opposition to the noting of jurisdiction of the appeal. The grounds then advanced were (1) that the case presents no substantial Federal question; and (2) that the question on which the decision depends is so unsubstantial as to need no further argument.

The cause originated in the Municipal Court (R. 1, 52). From judgment in the appellee's favor (R. 36-37), appellant appealed to the Appellate Term of the Supreme Court (R. 37). That Court affirmed (R. 41).

The New York City Municipal Court Code, §163 (N. Y. Laws of 1915, Ch. 279, p. 896), provides:

> "The judgment or order of the Appellate Court must be remitted for enforcement to the court below; and the clerk of the Appellate Court shall return to the clerk of the court in the district from which the appeal was taken, all the papers upon which the appeal was heard."

New York Civil Practice Act, §629 (Laws of 1920, Ch. 925, Vol. 4, p. 220; as amended by Laws of 1936, Ch. 656, p. 1435, in effect Sept. 1, 1937), provides:

> "Where the appeal is from * * * the Municipal Court of the City of New York, the judgment or order of the Supreme Court must be entered in the office of the clerk of such court."

Pursuant to the foregoing statutory provisions, the Clerk of the Appellate Term remitted to the Municipal Court on July 2, 1940, all the papers on which the appeal was heard (R. 42-43, 53-54), and thereupon the judgment of the Supreme Court was entered in the Municipal Court (R. 42-43).

On October 11, 1940, when this appeal was allowed (R. 47), the Appellate Term was not possessed of the record (R. 53-54).

Thus, by the State practice, the papers transmitted to the Appellate Court were, upon the decision by that Court, remitted to the lower court, no copy of the record being retained by the Appellate Court, and judgment on such remittitur was entered in the lower court. Therefore, the appeal should have been directed to the Municipal Court and was improperly directed to the Appellate Term.

Central New England R. Co. v. *Boston & A. R. Co.*, 279 U. S. 415; 49 Sup. Ct. 358.

Hodges v. *Snyder*, 261 U. S. 600; 43 Sup. Ct. 435.

Myers v. *International Trust Co.*, 273 U. S. 380, 381; 47 Sup. Ct. 372.

Davis v. *L. L. Cohen & Co.*, 268 U. S. 638; 45 Sup. Ct. 633.

Wedding v. *Meyler*, 192 U. S. 573; 24 Sup. Ct. 322.

Polleys v. *Black River Improvement Co.*, 113 U. S. 81; 5 Sup. Ct. 369.

The course subsequently pursued, of procuring the return of the record from the lower court to the Appellate Court, by order entered October 21, 1940 (R. 59-52), is unavailing. The appeal should in any event have been directed to the Municipal Court in which the judgment of the Appellate Term was entered. (*Central New England R. R. Co.* v. *Boston & A. R. Co.*, supra.) Assuming, however, the appeal might have been directed to the Appellate Term had it been possessed of the record, such was not the case; the record, when the appeal was allowed, was in the Municipal Court; the appeal directed to the Appellate Term was without vigor; the subsequent recall of the record could not vitalize it.

The appeal should therefore be dismissed.

Respectfully submitted,

Louis J. Vorhaus,
Counsel for Appellee.

Supreme Court of the United States

OCTOBER TERM, 1940

No. 586

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

DOROTHEA T. FRANK,

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE

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Supreme Court of the United States

OCTOBER TERM, 1940

No. 586

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

vs.

DOROTHEA T. FRANK.

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE

Opinion Below

The opinion of the Municipal Court is now unofficially reported.

Frank v. *N. Y., C. & St. L. R. Co.*, 24 N. Y. S. (2d) 846 (adv. sheets).

Jurisdiction

After the noting of probable jurisdiction, appellee filed a motion to dismiss the appeal upon the ground, not previously advanced, that the appeal is improperly directed to the Appellate Term of the Supreme Court of the State

of New York, First Department, instead of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District. That motion is pending, undetermined.

Summary of Argument

Section 143, New York Railroad Law, as applied in this case, does not conflict with Section 20a, Interstate Commerce Act. Section 20a does not apply.

The consolidation by which appellant was formed was effected under the laws of five states, among them New York, at a time when the State laws providing for consolidation had not been superseded as to interstate carriers by Federal enactment.

Under Section 142 of the New York Railroad Law (Consolidated Laws of New York, Chap. 49) the new corporation created by the consolidation acquired all of the property of its constituent companies. Section 143 provides that all the debts and liabilities of the constituent companies shall thenceforth attach to the new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it.

The then existing liability of the Lake Erie & Western Railroad Company upon its guaranty of the Northern Ohio interest coupons attached to appellee, the consolidated corporation, as an incident to the consolidation, by force of the statute pursuant to which the consolidation was effected. It was not a new obligation assumed by the new corporation, but an existing obligation which attached to it. It did not come within the purview of Section 20a of the Interstate Commerce Act; it is not an assumption for which application to and authorization by the Interstate Commerce Commission were required.

Section 20a is not aimed at the subsisting debts and liabilities of the constituents of a consolidated corporation.

It is not the purpose of that section to permit those debts and liabilities to be extinguished or the rights of the holders thereof impaired. Yet such result would follow, if Section 20a were held to extend to such cases, from the mere failure or deliberate refusal of the new corporation to apply to the Interstate Commerce Commission for leave to assume liability or from the refusal of the Commission to grant such authority—that would constitute a deprivation, without due process of law of the rights and property of the creditors of the constituent corporations.

When application was made to the Commission by this appellant consolidated corporation for authority to operate the lines of its constituents and to issue its own capital stock in exchange for the capital stock of its constituents, pursuant to the Articles of Consolidation, the Commission was cognizant of the provisions of the applicable state statutes by the terms of which the liabilities of the constituent corporations attached to the new corporation and, in effect, approved those terms, when it authorized the proposed issue and found that such issue was "compatible with the public interest * * * necessary and appropriate for and consistent with the performance by the carrier of service to the public as a common carrier, and will not impair its ability to perform that service".

The Interstate Commerce Commission has not construed Section 20a as including, under the term "assume", the attachment to a consolidated corporation, created under State laws, of the subsisting obligations of its constituents. The administrative interpretation seems to be the other way.

The appeal should be dismissed because improperly taken from the Appellate Term of the New York Supreme Court, instead of the Municipal Court, to which the record was remitted and in which the judgment was perfected.

ARGUMENT

POINT I

Section 143, New York Railroad Law, as applied in this case, does not conflict with Section 20a of the Interstate Commerce Act.

The consolidation by which appellant was created was effected under State laws (R. 7; 13, 23), at a time when Section 407 of the Transportation Act of 1920, 41 St. L. 480, Chap. 91, U. S. C. Title 49, Section 5, amending Section 5 of the Interstate Commerce Act, had not yet become applicable to such cases.

> *Snyder* v. *N. Y., Chicago & St. Louis R. Co.*, 278 U. S. 578, 49 S. Ct. 176, affirming 118 Ohio St. 72.

Since that time, by Section 5, subdivision (4) of the Interstate Commerce Act, as amended (Act June 16, 1933, Chap. 91, Sec. 202), the Congress has taken over the field so far as relates to the consolidation of interstate carriers, thus superseding, in such cases, the State statutes.

This case, however, deals with a consolidation validly effected under State statutes.

Section 142 of the New York Railroad Law (Consolidated Laws of New York, Chap. 49) provided:

> "Upon the consummation of such act of consolidation all the rights, privileges, exemptions and franchises of each of the corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property, rights of way, and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to such agreement and act * * *."

It is conceded that appellant did acquire the properties of its constituent companies (R. 7, 14).

The Lake Erie & Western Railroad Company, one of the constituents of the consolidated corporation (R. 7, 13), had guaranteed payment of interest coupons of the Northern Ohio bonds, in October, 1895, simultaneously with the issuance of the bonds (R. 12, 13). This was before the enactment of Section 20a of the Interstate Commerce Act (U. S. C. Title 49; 41 Stat. 494; Act Feb. 28, 1920, C. 91, Section 439), and the validity of that guaranty is not here in question.

New York Railroad Law (Consolidated Laws of New York, Chap. 49), Section 143, provides:

> "The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it * * *."

The purpose of the State statute is to charge the consolidated corporation and its property with the subsisting debts and liabilities of its constituent corporations and to prevent their extinction and defeat by the transfer of property effected by consolidation. Section 20a of the Interstate Commerce Act is not aimed at such debts and liabilities; it relates to obligations and liabilities newly created or assumed; its field of operation is wholly distinct from that covered by the State statute.

> *Missouri-Kansas-Texas R. Co.* v. *Mars*, 278 U. S. 258, 49 S. Ct. 103.

No new obligation was here "assumed" by appellant. The liability had been created by The Lake Erie & Western R. R. Co., and as an existing obligation of one of its con-

stituents "attached" to the consolidated corporation. Appellant's liability is not predicated upon any "assumption" under Section 20a, but upon the fact that the rights of creditors of the constituent corporations were preserved by consolidation under Section 143. It was not a guarantee which appellant "assumed" but an old liability which "attached" to the new corporation.

Friedman v. *N. Y. C. & St. L. R.R. Co.*, N. Y. L. J., April 27, 1940, p. 1740 (per Rosenman, J.).

Certainly, Section 20a cannot be construed as conferring upon a consolidated corporation any option or discretion to reject or repudiate any debt or liability which prior to the consolidation had been incurred by any of the constituent corporations; or as granting to the Interstate Commerce Commission the power to authorize such rejection or repudiation.

Nueces Valley Townsite Co. v. *San Antonio U. & E. R. Co.*, 123 Tex. 167, 67 S. W. (2d) 215, 221.

It was not the purpose of Section 20a to permit the debts and liabilities of the constituent corporations to be defeated or the rights of their creditors to be impaired. Yet such result would follow, if Section 20a were held to extend to such cases as this, from the mere failure or deliberate refusal of the new corporation to apply to the Interstate Commerce Commission for leave to assume liability or from the refusal of the Commission to grant such authority. That would constitute a deprivation, without due process of law of the rights and property of the creditors of the constituent corporations.

While the bondholders may have a remedy in equity against the mortgaged properties (*R.R. Co.* v. *Howard*, 7 Wall. 392), they cannot be limited and restricted to that remedy—they cannot be compelled to forego the guaranties or the liability thereon, which, through consolidation, devolved upon appellant.

Under Section 142 of the New York Railroad Law, all of the property, assets and effects of all of the constituent corporations have become transferred to and vested in the new corporation and became "as effectually the property of the new corporation as they were of the former corporations". Following consolidation, action in the New York courts upon any of the debts and liabilities of any of the constituent corporations must be brought against the new corporation.

Cameron v. *United Traction Co.*, 67 N. Y. App. Div. 557;

Lee v. *Stillwater & Mechanicville Street R. Co.*, 140 N. Y. App. Div. 773.

The Lake Erie & Western Railroad Company, whose property and assets have vested in appellant, is left by the consolidation in this position: "There is then no power left to control in its behalf any of its funds, or to pay off any of its indebtedness" (*Mount Pleasant* v. *Beckwith*, 100 U. S. 514).

If, in these circumstances, the bondholders may not enforce the guaranty of The Lake Erie & Western Railroad Company by recourse to the liability which, as a condition of the consolidation is imposed upon the new corporation by Section 143, to be "enforced against it and its property to the same extent as if incurred or contracted by it"; if the bondholders are to be limited to their recourse against the mortgaged properties (for, surely, they could not unscramble the commingled assets of the consolidated corporation), then, clearly, their claims are impaired by the transfer of the property, and if Section 20a were to be construed as requiring the authorization of the Interstate Commerce Commission in such a situation, then, certainly, the creditors of the constituent corporations are deprived of their rights and property without due process of law, and this, of course, may not be done even in the regulation of commerce.

United States v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 327, 51 S. Ct. 159.

There is no need to consider whether the attachment of liability is or is not the result of voluntary action. The question is whether under Section 20a the term "assumption" applies to a liability which attaches upon consolidation. We submit it does not; it connotes new issues of securities and new assumptions of financial responsibility.

Cases are cited which speak of "assumption" by a consolidated corporation of the liabilities of the old companies. But in those cases the expression was employed loosely and not in the sense which appellant seeks to impress upon it.

> "It cannot be reasonably expected that every word, phrase or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wresting it from its surroundings, disregarding its context and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result."
>
> *Crane* v. *Bennett*, 177 N. Y. 106, 112.

No provision of Section 20a applies to the facts of this case or deals with the obligations which attached on consolidation under State laws.

Citations bearing upon the evils of the issuance of excessive amounts of securities or the assumption of excessive security obligations in order to acquire new lines (*Financial Investigation of N. Y., N. H. & H. R. R. Co.*, 31 I. C. C. 32, 41-43; *St. Louis & San Francisco Railroad Investigation*, 29 I. C. C. 139, 150) are not in point. Sharfman, *The Interstate Commerce Commission*, Vol. 1, page 192, quite correctly refers to the large discretionary control vested in the Commission (by Sec. 20a) over the amount and character of "new issues" of railroad securities and of "new assumptions of financial responsibility". The obligations involved in the present case fall within neither category.

The Mann-Elkins Bill (61st Congress, 2d Session, H. R. 17536) failed in the Senate; whatever might have been its effect, if enacted, the fact is that Section 20a, subsequently enacted, eliminated, and, we submit, did not embrace "the assumption of all or any of the bonds or other obligations of the corporations so consolidated or merged", and so left the status of those obligations to the operation and effect of the State consolidation statutes, until by the amendment of 1933, they were superseded, so far as interstate carriers were concerned, by Section 5, subdivision (4) of the Interstate Commerce Act.

This Court, in *Railroad Commission* v. *Southern Pacific Co.*, 264 U. S. 331, 44 S. Ct. 376, referred to Section 20a as subjecting to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all "future" shares of stock, bonds or other evidences of indebtedness.

There was here, in respect of the guaranty, no new obligation, no new assumption of financial responsibility and no additional burden imposed upon the consolidated corporation.

The fact that the Commission, in *Assumption of Obligations by L. S. & I. R. R.*, 86 I. C. C. 640, entertained and granted the application is no indication that the Commission construed Section 20a as requiring the making of such application. Rather, from the language it used, the inference is that the Commission deemed the State statutes fully effective in attaching liability irrespective of the application.

Such also is the inference to be drawn from other decisions by the Commission, not involving the attachment to the consolidated corporation of the existing liabilities of its constituents:

> "The applicant is the successor, by consolidation, of the Toledo, St. Louis & Western Railroad Co. and other companies and by virtue of such consolidation

has acquired all property, rights and powers and has assumed all obligations of the Toledo, St. Louis & Western Railroad Co."

Pledge of Toledo, St. Louis & Western Bonds by New York, Chicago & St. Louis Railroad, 86 I. C. C. 465 (1924).

It is to be noted that the Toledo, St. Louis & Western is one of the parties to the consolidation here under consideration (R. 7, 13-14, 24).

"The first mortgage bonds of the Northern bear the guaranty of the Lake Erie & Western, predecessor lessee, and unpaid interest coupons have been purchased on behalf of the New York, Chicago & St. Louis. From the consolidation of the Lake Erie & Western with the New York, Chicago & St. Louis, resulting liability of the latter on the Lake Erie's guaranty of the Northern's bonds thus is apparently admitted."

Akron, C. & Y. Ry. Co. and Northern O. Ry. Co. Reorganization, 228 I. C. C. 645.

This has reference to the same guaranty upon which the present suit is predicated

"It appears that the consolidation was completed on April 11, 1923, and that the new company is now vested with the property, rights and franchises of the Nickel Plate and other constituent companies, subject to all their debts, obligations and liabilities."

New York, Chicago & St. Louis R. R. Bonds, 82 I. C. C. 365.

Missouri, Kansas, Texas Railroad Co. v. *Mars*, 278 U. S. 258, 49 S. Ct. 103, did not involve a merger. There the appellant had acquired railroad properties from a group who had purchased them from a receiver of the corporation which had originally owned them. A Texas statute authorized such a receivership sale but provided

that the property so sold should be sold subject to certain tort claims. The property was bought from the receiver subject to these tort claims and the new company took the properties from the purchasers subject to these claims. Appellant there sought to invoke Section 20a of the Interstate Commerce Commission Act to excuse a refusal to honor such a tort claim. This Court held Section 20a to be inapplicable.

Railroad Commission v. *Southern Pacific Company*, 264 U. S. 331, 44 S. Ct. 376, bears no analogy to the case at bar. There, the State Commission sought to impose upon an interstate carrier a new "undertaking", i.e., the building of a union station. As already observed, the opinion of this Court in that case (264 U. S. at p. 347) referred to Section 20a, as subjecting to the approval or rejection of the Interstate Commerce Commission the issue by an interstate carrier of all "future" shares, etc. It did not treat of existing obligations devolving upon a corporation by consolidation.

New York, C. & St. L. R. Co., Assumption of Obligations, 217 I. C. C. 598, and *New York, C. & St. L. R. Co., Bonds and Assumption*, 221 I. C. C. 772, both relate to assumption of liability under agreements extending maturity dates. Since they related to new evidences of debt, they were, of course, governed by Section 20a. But it must be manifest from both of those instances that the construction placed upon Section 20a both by the Commission and by the appellant was such that in respect of the obligations which attached upon consolidation, no application or authority to assume liability was required. 217 I. C. C. 598 related to bonds, which the Lake Erie & Western had issued prior to the consolidation and were to mature January 1, 1937. 221 I. C. C. 772 related to bonds which the former New York, Chicago & St. Louis had issued prior to the consolidation and were to mature Octo-

ber 1, 1937. It is clear that from the time of the consolidation in April, 1923 (R. 7, 13, 23), until November, 1936, and August, 1937, respectively, when these applications to authorize the extensions were made, this appellant consolidated corporation had paid the interest upon the original bond issues, without application to the Commission for or grant by the Commission of authority to do so—obviously because such application and authority in that connection were deemed, and rightly so, to be unnecessary.

New York Central Securities Corp. v. *United States*, 54 F. (2d) 122, aff'd 287 U. S. 12, 53 S. Ct. 45; *Texas* v. *United States*, 292 U. S. 522; 54 S. Ct. 819; *People* v. *New York Central R. Co.*, 233 N. Y. 679, and *Whitman* v. *Northern Central Ry. Co.*, 146 Md. 580, 127 Atl. 112, are not germane, since they do not relate to liabilities attaching by consolidation.

Although with regard to liabilities and obligations which attached by consolidation, application to and approval by the Interstate Commerce Commission were not required, nevertheless the Commission did have and did exercise the power of approval in another manner. This appellant consolidated corporation applied to the Commission for authority to operate the lines of its constituents and to issue its own capital stock in exchange for the capital stock of its constituents, pursuant to the Articles of Consolidation (R. 14). This application so to issue its own stock appellant was bound to make under Section 20a. When this application was made the Commission was fully cognizant of the provisions of the applicable State statutes by the terms of which the liability of its constituents attached to the consolidated corporation. This is clearly shown by the opinion which the Commission rendered:

> "Applicable state laws afford means to effect the consolidation. Such laws are in force. They are, in fact, the laws to which resort must be had to effectuate consolidations which the interstate commerce act is

designed to facilitate. We cannot conclude that they have been nullified or superseded. As valid existing laws we have no power to suspend them."

Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company, 79 I. C. C. 581, 585 (June 18, 1923).

It is fair to assume, therefore, that when the Commission granted to appellant the authority to operate the lines and issue its stock in exchange for the stock of its constituents, it necessarily approved the conditions under which the consolidation was effected, including the attachment to the new company of the liabilities of its constituents; for it found, and under Section 20a(2) it could make the order only if it did find, that such new issue was "compatible with the public interest * * * necessary and appropriate for and consistent with the performance by the carrier of service to the public as a common carrier, and will not impair its ability to perform that service".

POINT II

The appeal should be dismissed because improperly taken from the Appellate Term of the Supreme Court of the State of New York, First Department, instead of the Municipal Court of the City of New York, Borough of Manhattan, Ninth District, to which the record was remitted and in which the judgment was perfected.

Motion for dismissal on that ground has been filed and is pending. In this brief, therefore, we merely supplement the argument already submitted on that motion.

In *Atherton* v. *Fowler*, 91 U. S. 143, this Court adverted to the fact that "in some states—as, for instance, New York and Massachusetts—the practice is for the highest court, after its judgment has been pronounced, to send the record

and the judgment to the inferior court, where they thereafter remain". And in *Radice* v. *New York*, 264 U. S. 292, 293, 44 S. Ct. 325, where, after affirmance by the New York Court of Appeals, the record had been remitted to the City Court of Buffalo, in which the cause originated, the writ of error was allowed by this Court to the City Court.

CONCLUSION

The appeal should be dismissed, or, in the alternative, the judgment should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 586

15

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,
Appellant,

v.

DOROTHEA T. FRANK,
Appellee.

ON APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEE IN OPPOSITION TO PETITION FOR REHEARING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 586

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

v.

DOROTHEA T. FRANK,

Appellee.

ON APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK.

BRIEF FOR APPELLEE IN OPPOSITION TO PETITION FOR REHEARING

I

Appellant has unduly magnified the scope of the question presented by this appeal and the effect of the decision. The question presented relates to the applicability of Section 20a of the Interstate Commerce Act to the debts and liabilities which by virtue of State statutes attach to a consolidated interstate carrier whose consolidation was effected under such State statutes at a time when they had not been superseded by Federal enactment. As regards

future consolidations, or consolidation effected under paragraph (4) of Section 5 of the Interstate Commerce Act as amended by the Act of June 16, 1933, the question is not here, was not determined, and need not be considered.

Appellant asserts that "any consolidation approved by the Commission under Section 5 can only be effected under State Consolidation Statutes * * *" (Petition for Rehearing, bottom of page 2). Clearly, Appellant is in error. The *Snyder* case held that Section 5 had not yet become applicable to such consolidations. The Commission had not adopted its complete plan of unification. Therefore, consolidations were still to be effected under applicable State statutes.

Thereafter Congress amended Section 5. Under the 1933 Act consolidations were to be in harmony with the tentative plan (Sec. 5, par. 4b). The tentative plan already had been adopted. Thus, consolidations of interstate carriers could no longer be had under State statutes, except in so far as such State statutes provide the mechanics therefor.

II

Appellant's position in seeking shelter behind Section 20a is unconscionable. Under that section the proceedings before the Commission are set in motion and the Commission acts "upon application by the carrier". Unless the carrier applies the Commission can make no order authorizing the assumption of obligation or liability. If then such authorization was necessary, it was at least incumbent upon the Appellant to make such application, and if thereupon the Commission refused to authorize such assumption, then Appellant would be justified in asserting such refusal as a defense; but it cannot have been intended that Appellant might be deliberately omitting to make such application, claim immunity from discharging the debts and liabilities of its constituent corporations; nor did it claim such immunity when without specific authorization

it made interest payments on the Northern Ohio coupons and on the mortgage bonds of its constituents.

Appellant ought not to be heard on an application for rehearing until it has first endeavored to set to rights a state of confusion created by its own conduct. It is submitted that fair dealing and good faith should require Appellant first to make application to the Interstate Commerce Commission before coming here with a petition for a rehearing.

In 1923 Appellant obtained an authorization from the Interstate Commerce Commission to operate the lines of the constituent companies and to issue the stock of the new company in exchange for the stock of the constituent companies. It clearly appears from the Commission's report that the Commission conceived its function as supplementing and facilitating consolidations which were still to be effected under State law. Applicable State laws provided that the obligations of the constituent companies should attach to the consolidated company. Appellant, now disputing that obligations so attach, in effect, holds that the Commission's own conception of its jurisdiction was erroneous. Appellant would retain the benefits of an authorization obtained under what it holds to be an erroneous conception of the Commission's function without first attempting to set the matter to rights before the Commission itself.

The Commission, in authorizing the proposed stock issue of the new company, must have taken into account the security obligations ahead of that stock, which obligations included the securities here in suit. In two later cases the Commission spoke of this Appellant having assumed these obligations (*Pledge of Toledo, St. Louis & Western Bonds by New York, Chicago & St. Louis Railroad*, 86 I. C. C. 465 [1924], and *Akron, C. & Y. Ry. Co. & Northern O. Ry. Co. Reorganization*, 228 I. C. C. 645).

Assuming that the Commission could make a valid order authorizing a consolidation without the attachment of the security obligations of the constituent companies, it is

most unlikely that the Commission would ever have granted such an application. Rather, they would have insisted that application be made that these obligations should attach to the new corporation as a condition of authorizing a consolidation of the properties. This matter could and should be set to rights by a new application made to the Commission at this time. Appellant is the only person who could make such an application. Appellee has no status to set the Commission in motion. Appellant should not be heard to petition for a rehearing because of a claimed confusion for which it is itself responsible, and which confusion it itself could set to rights by an appropriate application made to the Commission at this time.

III

The circumstances that this affirmance was by an equally divided court would appear to be no reason for ordering a rehearing before a full bench.

Brown v. *Aspden's Administrators*, 14 How. 25.

Since Appellant concedes that this decision by a divided court determines the law only as between the immediate parties, the court may not be concerned with the Appellant's solicitude with regard to other pending litigation.

IV

The petition for rehearing should be denied.

Respectfully submitted,

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David Vorhaus,
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Supreme Court of the United States

OCTOBER TERM 1941

No. 15

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,
Appellant,

v.

DOROTHEA T. FRANK,
Appellee.

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

ON REHEARING

BRIEF FOR APPELLEE

TO BE SUBSTITUTED FOR BRIEFS PREVIOUSLY FILED BY APPELLEE

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Supreme Court of the United States

OCTOBER TERM 1941

No. 15

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,
Appellant,

v.

DOROTHEA T. FRANK,
Appellee.

APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR APPELLEE

Opinion Below

The opinion of the Municipal Court is reported:

Frank v. *New York, Chicago & St. Louis R.R. Co.*, 175 Misc. 902, 24 N. Y. S. (2d) 846.

Summary of Argument

Section 143, New York Railroad Law, as applied in this case, does not conflict with § 20a, Interstate Commerce Act. § 20a does not apply.

The consolidation by which appellant was formed was effected under the laws of five States, among them New York, at a time when the State laws governing consolidation had not been superseded as to interstate carriers by Federal enactment.

Under § 142 of the New York Railroad Law (Consolidated Laws of New York, Chap. 49), the new corporation created by the consolidation acquired all of the property of its constituent companies. § 143 provides that all the debts and liabilities of the constituent companies shall thenceforth attach to the new corporation and be enforced against it and its property to the same extent as if incurred or contracted by it.

The then existing liability of the Lake Erie & Western Railroad Company upon its guaranty of the Northern Ohio interest coupons attached to appellee, the consolidated corporation, as an incident to the consolidation, by force of the statute pursuant to which the consolidation was effected. It was not a new obligation assumed by the new corporation, but an existing obligation which attached to it. It did not come within the purview of § 20a of the Interstate Commerce Act; it is not an assumption for which application to and authorization by the Interstate Commerce Commission were required.

Section 5 of the Interstate Commerce Act, as amended in 1933, gives the Interstate Commerce Commission plenary and complete powers over plans of consolidation, which would include jurisdiction of the subject-matter of the attachment of security obligations to a consolidated corporation. Granted that Congress has since 1933 intended not to exclude such subject-matter from the Commission's jurisdiction, it is not necessary to hold that § 20a is aimed at subsisting debts of the constituents of a consolidated corporation in order to find the statutory sanction for such jurisdiction.

It is not the purpose of that section to permit those debts and liabilities to be extinguished or the rights of the holders thereof impaired. Yet such result would follow, if § 20a were held to extend to such cases, from the mere failure or deliberate refusal of the new corporation to apply to the Interstate Commerce Commission for leave to assume liability. Such result might constitute a deprivation without due process of law of the rights and property of the creditors of the constituent corporations.

When application was made to the Commission by this appellant consolidated corporation for authority to operate the lines of its constituents and to issue its own capital stock in exchange for the capital stock of its constituents, pursuant to the Articles of Consolidation, the Commission was cognizant of the provisions of the applicable State statutes, by the terms of which the liabilities of the constituent corporations attached to the new corporation, and, in effect, approved those terms when it authorized the proposed issue and found that such issue was "compatible with the public interest * * * necessary and appropriate for and consistent with the performance by the carrier of service to the public as a common carrier, and will not impair its ability to perform that service".

The Interstate Commerce Commission has not construed § 20a as including, under the term "assume", the attachment to a consolidated corporation, created under State laws alone, of the subsisting obligations of its constituents. The administrative interpretation seems to be the other way.

If authorization to assume liability was necessary, it was incumbent on appellant to make application therefor and it should not be heard to plead its own omission to do so as a defense.

The application of § 20a to consolidations effected under the amendment of 1933 is not in question and not to be determined on this appeal.

ARGUMENT

POINT I

§ 143, New York Railroad Law, as applied in this case, does not conflict with § 20a of the Interstate Commerce Act.

The consolidation by which appellant was created was effected under State laws (R. 7, 13, 23), at a time when § 407 of the Transportation Act of 1920 (41 St. L. 480, Chap. 91; U. S. C., Title 49, § 5), amending § 5 of the Interstate Commerce Act, had not yet become applicable to such cases.

> *Snyder* v. *N. Y., Chicago & St. Louis R. Co.*, 278 U. S. 578, 49 S. Ct. 176, affirming 118 Ohio St. 72.

Since that time, by § 5, subdivision (4) of the Interstate Commerce Act, as amended (Act of June 16, 1933, Chap. 91, § 202), the Congress has entered the field so far as relates to the consolidation of interstate carriers, thus superseding, to the extent of such legislation, the State statutes.

This case, however, deals with a consolidation validly effected solely under State statutes.

§ 142 of the New York Railroad Law (Consolidated Laws of New York, Chap. 49) provided:

> "Upon the consummation of such act of consolidation all the rights, privileges, exemptions and franchises of each of the corporations, parties to the same, and all the property, real, personal and mixed, and all the debts due on whatever account to either of them, as well as all stock subscriptions and other things in action belonging to either of them, shall be taken and deemed to be transferred to and vested in such new corporation, without further act or deed; and all claims, demands, property, rights of way and every other interest shall be as effectually the property of the new corporation as they were of the former corporations, parties to such agreement and act * * *."

It is conceded that appellant did acquire the properties of its constituent companies (R. 7, 14).

The Lake Erie & Western Railroad Company, one of the constituents of the consolidated corporation (R. 7, 13), had guaranteed payment of interest coupons of the Northern Ohio bonds, in October, 1895, simultaneously with the issuance of the bonds (R. 12, 13). This was before the enactment of § 20a of the Interstate Commerce Act (U. S. C. Title 49; 41 Stat. 494; Act Feb. 28, 1920, Chap. 91, § 439), and the validity of that guaranty is not here in question.

New York Railroad Law (Consolidated Laws of New York, Chap. 49), § 143, provides:

> "The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it * * *."

No new obligation was here "assumed" by appellant. The liability had been created by The Lake Erie & Western Railroad Company, and as an existing obligation of one of its constituents "attached" to the consolidated corporation. Appellant's liability is not predicated upon any "assumption" within the purview of § 20a, but upon the fact that the debts of the constituent corporations "attached" to the consolidated corporation by the very terms of § 143. The attachment of that liability was imposed upon the new corporation by the State statute as a condition of the consolidation. § 20a does not embrace such a situation; it does not pertain to obligations attaching to a corporation by consolidation under State laws, with which the Commission had no power to interfere.

Friedman v. *N. Y., C. & St. L. R. R. Co.*, N. Y. L. J., April 27, 1940, p. 1740 (per Rosenman, J.).

It was not the purpose of § 20a to permit the debts and liabilities of the constituent corporations to be defeated or the rights of their creditors to be impaired. Yet such result would follow, if § 20a were held to extend to such cases as this, from the mere failure or deliberate refusal of the new corporation to apply to the Interstate Commerce Commission for leave to assume liability. That could easily constitute a deprivation without due process of law of the rights and property of the creditors of the constituent corporations.

While the bondholders may have a remedy in equity against the mortgaged properties (*R. R. Co.* v. *Howard*, 7 Wall. 392), they should not be limited and restricted to that remedy—they ought not to be compelled to forego the guaranties or the liability thereon, which, through consolidation, devolved upon appellant.

The Lake Erie & Western Railroad Company, whose property and assets have vested in appellant, is left by the consolidation in this position: "There is then no power left to control in its behalf any of its funds, or to pay off any of its indebtedness" (*Mount Pleasant* v. *Beckwith*, 100 U. S. 514, 528).

If, in these circumstances, the bondholders may not enforce the guaranty of The Lake Erie & Western Railroad Company by recourse to the liability which, as a condition of the consolidation is imposed upon the new corporation by § 143, to be "enforced against it and its property to the same extent as if incurred or contracted by it"; if the bondholders are to be limited to their recourse against the mortgaged properties (for, surely, they could not unscramble the commingled assets of the consolidated corporation), then their claims might well be impaired by the transfer of the property, and if § 20a were to be construed as requiring the authorization of the Interstate Commerce Commission in such a situation, then the creditors of the constituent corporations might be deprived of their rights and property without due process of law, and this, of course, may not be done even in the regulation of commerce.

United States v. *Chicago, M., St. P. & P. R. Co.*, 282 U. S. 311, 327, 51 S. Ct. 159.

We are not unmindful of the holding in *Irvine* v. *New York Edison Co.*, 207 N. Y. 425. But there the constitutional question was not considered.

There is no need to consider whether the attachment of liability is or is not the result of voluntary action. The question is whether under § 20a the term "assumption" applies to a liability which, by virtue of applicable State statute, attaches upon consolidation. We submit it does not.

Cases are cited which speak of "assumption" by a consolidated corporation of the liabilities of the old companies. But in those cases the expression was employed loosely and not in the sense which appellant seeks to impress upon it.

> "It cannot be reasonably expected that every word, phrase or sentence contained in a judicial opinion will be so perfect and complete in comprehension and limitation that it may not be improperly employed by wresting it from its surroundings, disregarding its context and the change of facts to which it is sought to be applied, as nothing short of an infinite mind could possibly accomplish such a result."
>
> *Crane* v. *Bennett*, 177 N. Y. 106, 112.

No provision of § 20a applies to the facts of this case or deals with obligations which attached on consolidation under State laws alone.

The fact that the Commission, in *Assumption of Obligations by L. S. & I. R. R.*, 86 I. C. C. 640, entertained and granted the application is no indication that the Commission construed § 20a as requiring the making of such application. Rather, from the language it used, the inference is that the Commission deemed the State statutes fully effective in attaching liability irrespective of the application.

Such also is the inference to be drawn from other decisions by the Commission, not involving the attachment to the consolidated corporation of the existing liabilities of its constituents:

> "The applicant is the successor, by consolidation, of the Toledo, St. Louis & Western Railroad Co. and other companies and by virtue of such consolidation has acquired all property, rights and powers and has assumed all obligations of the Toledo, St. Louis & Western Railroad Co."
>
> *Pledge of Toledo, St. Louis & Western Bonds by New York, Chicago & St. Louis Railroad*, 86 I. C. C. 465 (1924).

It is to be noted that the Toledo, St. Louis & Western is one of the parties to the consolidation here under consideration (R. 7, 13-14, 24).

> "The first mortgage bonds of the Northern bear the guaranty of the Lake Erie & Western, predecessor lessee, and unpaid interest coupons have been purchased on behalf of the New York, Chicago & St. Louis. From the consolidation of the Lake Erie & Western with the New York, Chicago & St. Louis, resulting liability of the latter on the Lake Erie's guaranty of the Northern's bonds thus is apparently admitted."
>
> *Akron, C. & Y. Ry. Co. and Northern O. Ry. Co. Reorganization*, 228 I. C. C. 645.

This has reference to the same guaranty upon which the present suit is predicated.

> "It appears that the consolidation was completed on April 11, 1923, and that the new company is now vested with the property, rights and franchises of the Nickel Plate and other constituent companies, subject to all their debts, obligations and liabilities."
>
> *New York, Chicago & St. Louis R. R. Bonds*, 82 I. C. C. 365.

Missouri-Kansas-Texas Railroad Co. v. *Mars*, 278 U. S. 258, 49 S. Ct. 103, did not involve a consolidation. There the appellant had acquired railroad properties from a group who had purchased them from a receiver of the corporation which had originally owned them. A Texas statute authorized such a receivership sale but provided that the property so sold should be sold subject to certain tort claims. The property was bought from the receiver subject to these tort claims and the new company took the properties from the purchaser subject to these claims. Appellant there sought to invoke § 20a of the Interstate Commerce Act to excuse a refusal to honor such a tort claim. This Court held § 20a to be inapplicable.

Railroad Commission v. *Southern Pacific Company*, 264 U. S. 331, 44 S. Ct. 376, bears no analogy to the case at bar. There, the State Commission sought to impose upon an interstate carrier a new "undertaking", i. e., the building of a union station.

New York, C. & St. L. R. Co., Assumption of Obligations, 217 I. C. C. 598, and *New York, C. & St. L. R. Co., Bonds and Assumption*, 221 I. C. C. 772, both relate to assumption of liability under agreements extending maturity dates. Since they related to new evidences of debt, they were, of course, governed by § 20a. But it must be manifest from both of those instances that the construction placed upon § 20a both by the Commission and by the appellant was such that in respect of the obligations which attached upon consolidation, no application or authority to assume liability was required. 217 I. C. C. 598 related to bonds, which the Lake Erie & Western had issued prior to the consolidation and were to mature January 1, 1937. 221 I. C. C. 772 related to bonds which the former New York, Chicago & St. Louis had issued prior to the consolidation and were to mature October 1, 1937. It is clear that from the time of the consolidation in April, 1923 (R. 7, 13, 23), until November, 1936, and August, 1937, respectively, when these applications to authorize the extensions were made, this appellant consolidated corporation had paid the interest

upon the original bond issues, without application to the Commission for or grant by the Commission of aathority to do so—obviously because such application and authority in that connection were deemed, and rightly so, to be unnecessary.

New York Central Securities Corp. v. *United States*, 54 F. (2d) 122, aff'd 287 U. S. 12, 53 S. Ct. 45; *Texas* v. *United States*, 292 U. S. 522; 54 S. Ct. 819; *People* v. *New York Central R. Co.*, 233 N. Y. 679, and *Whitman* v. *Northern Central Ry. Co.*, 146 Md. 580, 127 Atl. 112, are not germane, since they do not relate to liabilities attaching by consolidation.

This appellant consolidated corporation did apply to the Interstate Commerce Commission for authority to operate the lines of its constituents and to issue its own capital stock in exchange for the capital stock of its constituents, pursuant to the Articles of Consolidation.

> *Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company*, 79 I. C. C. 581.

Authority to acquire the consolidated lines was not required by § 5. Paragraph (2) of that section applied only to a plan "not involving consolidation"; and the provisions of paragraph (6) of that section relative to consolidation had not yet become applicable. It was possible, however, that a certificate of public convenience might be considered requisite under § 1(18). So the application therefor was appropriate.

The issuance by appellant of its own capital stock came within the letter of § 20a, and so application for authority on that behalf was likewise appropriate, though there is doubt as to whether it was applicable.

But the debts of the constituent companies attached to the consolidated corporation, as a condition of the consolidation, by virtue of applicable State statutes which had not as yet been superseded by Federal enactment. There-

fore, to charge the consolidated company with liability thereon, the authority of the Interstate Commerce Commission to assume such liability was not requisite.

Nevertheless, in connection with appellant's application for authority to operate the lines of its constituents and to issue its own stock, the Interstate Commerce Commission did have and exercised the power of approval with regard to the obligations and liabilities which attached by the consolidation. When that application was made, the Commission was fully cognizant of the provisions of the applicable State statutes by the terms of which the liability of its constituents attached to the consolidated corporation. This is clearly shown by the opinion which the Commission rendered:

> "Applicable state laws afford means to effect the consolidation. Such laws are in force. They are, in fact, the laws to which resort must be had to effectuate consolidations which the interstate commerce act is designed to facilitate. We cannot conclude that they have been nullified or superseded. As valid existing laws we have no power to suspend them."
>
> *Operation of Lines and Issue of Capital Stock by the New York, Chicago & St. Louis Railroad Company*, 79 I. C. C. 581, 585 (June 18, 1923).

It is fair to assume, therefore, that when the Commission granted to appellant the authority to operate the lines and issue its stock in exchange for the stock of its constituents, it necessarily approved the conditions under which the consolidation was effected, including the attachment to the new company of the liabilities of its constituents; for it found, and under § 20a (2) it could make the order only if it did find, that such new issue was "compatible with the public interest * * * necessary and appropriate for and consistent with the performance by the carrier of service to the public as a common carrier, and will not impair its ability to perform that service".

POINT II

Appellant may not assert a defense, based upon its own omission to apply for authority to assume liability.

In 1923 appellant obtained an authorization from the Interstate Commerce Commission to operate the lines of the constituent companies and to issue the stock of the new company in exchange for the stock of the constituent companies. It clearly appears from the Commission's report that the Commission conceived its function as supplementing and facilitating consolidations which were still to be effected under State law. Applicable State laws provided that the obligations of the constituent companies should attach to the consolidated company. Appellant, now disputing that obligations so attach, in effect, holds that the Commission's own conception of its jurisdiction was erroneous. Appellant would retain the benefits of an authorization obtained under what it holds to be an erroneous conception of the Commission's function without first attempting to set the matter to rights before the Commission itself.

Under § 20a, the proceedings before the Commission are set in motion and the Commission acts "upon application by the carrier". Unless the carrier applies, the Commission can make no order authorizing the assumption of obligation or liability. If then such authorization was necessary, it was incumbent upon the appellant to make such application and it should not be heard to plead its own omission to do so as a defense.

Maroney v. *Wheeling & L. E. Ry. Co.*, 33 F. (2d) 916, 917.

Cheatham v. *Wheeling & L. E. Ry. Co.*, 37 F. (2d) 593, 596.

Murphy v. *North American Light & Power Co.*, 106 F. (2d) 74, 81-82.

Had appellant made such application, and had the Commission thereupon refused to authorize such assumption, then appellant would be justified in asserting such refusal as a defense; but it cannot have been intended that appellant might, by omitting to make such application, claim immunity from discharging the debts and liabilities of its constituent corporations; nor did it claim such immunity when, without specific authorization, it made interest payments on the Northern Ohio coupons and on the mortgage bonds of its constituents.

Appellant's position in seeking shelter behind § 20a is unconscionable. It is clear that when it granted appellant's application (79 I. C. C. 581) to authorize the issuance of capital stock and the acquisition and operation of the lines of its constituents, the Interstate Commerce Commission assumed and acted on the assumption that by applicable State laws the debts and liabilities of the constituents attached to the consolidated corporation, without application or authorization under § 20a. This is borne out by the Commission's statement in two later cases:

> *Pledge of Toledo, St. Louis & Western Bonds by New York, Chicago & St. Louis Railroad*, 86 I. C. C. 465.
>
> *Akron C. & Y. Ry. Co. and Northern O. Ry. Co. Reorganization*, 228 I. C. C. 645.

Moreover, the Commission, in authorizing the proposed stock issue of the new company, must have taken into account the security obligations ahead of that stock, which obligations included the guaranty here in suit.

Assuming that the Commission could make a valid order, authorizing a consolidation, without the attachment of the security obligations of the constituent companies, it is most unlikely that the Commission would ever have granted such an application. Rather, they would have insisted that application be made that these obligations should attach to the new corporation as a condition of authorizing the consolidation of the properties.

When appellant came before the Commission with the application which was granted in 79 I. C. C. 581, it must have considered the applicability and effect of the State statutes, including the New York Railroad Law, § 143, which provided for the attachment of the liabilities of the constituent corporations to the new corporation. With respect thereto, it must have taken one of three positions: Either that the State statute attaching liability did govern, without application or authorization under § 20a; or that it did not; or that the question was in doubt.

If it took the first of these positions, then it shared the view of the Interstate Commerce Commission and procured its authorization on that basis. If now it should be held by this Court that § 143 did not apply and § 20a does, then it is clear that the authorization for which appellant applied and which the Commission granted was procured by mutual mistake.

If, on the other hand, appellant took either of the other two positions, then it misled the Commission by failing to set forth its position and to indicate whether in seeking the authorization for which it applied, it did or did not intend to assume the liabilities of its constituents. In that case, again assuming this Court should now hold the position of the Commission to have been erroneous, appellant procured its authorization through mistake, on the part of the Commission, and lack of disclosure, on the part of appellant.*

Under such circumstances, appellant should not be permitted at this time to take advantage of the erroneous view of the Commission (if held erroneous by this Court), to slough off the obligations of its constituents. Since ap-

* The policy of the Interstate Commerce Act to require the carrier to apprise the Commission fully respecting the security obligations is illustrated by §20a (19). This provision permits a carrier to issue without authority from the Commission, short term notes not to exceed 5% of its outstanding securities, and not to mature more than two years from the date of issue. But even in such cases the carrier is required within ten days to notify the Commission with the same particularity as is required in the case of security issues requiring authorization.

pellee could not intervene, it is plainly the duty of the appellant to apply to the Commission to reopen its application and to determine the same, in accordance with its proper setting. To remit appellee to a supposed remedy by suit against the Lake Erie and Western and then by further suit to trace its assets in the hands of the appellee would be futile. It is over eighteen years since the consolidation was effected. It cannot be doubted that in that time the assets of the Erie have been irretrievably commingled in the assets of the consolidated corporation; that any such remedy would be illusory; and that the remedy on the guarantee is lost, unless it can be enforced against appellant. "The suggestion that creditors may pursue their remedy against the original contracting party is little less than a mockery" (*Mt. Pleasant* v. *Beckwith*, 100 U. S. 514, 534).

The very fact of the default on the guaranty here in suit suggests the futility of pursuing the remedy which appellant asserts to be available.

POINT III

This appeal does not call for a determination as to the application of § 20a to consolidations effected under the amendment of 1933.

The question here presented is limited in scope. It relates to the applicability of § 20a of the Interstate Commerce Act to the debts and liabilities which, by virtue of State statutes, attach to a consolidated interstate carrier, whose consolidation was effected under such State statutes at a time when they had not been superseded by Federal enactment. As regards consolidations which have been or which in future may be effected under paragraph (4) of § 5 of the Interstate Commerce Act, as amended by the Act of June 16, 1933, the question is not here. If and when it arises, it will present a different aspect, depending for its solution on considerations not presented here. For example, to what extent has the amendment superseded State

legislation; has it nullified the application to interstate carriers of such State statutes as § 143 of the New York Railroad Law, or authorized the disregard thereof; can the Federal Government require a State to sanction a consolidation under the laws of that State, free from the conditions annexed by such State laws to such consolidation? If this may be and has been done, then it may be that, as to subsequent consolidations of interstate carriers, since the debts of the constituent corporations would no longer attach, ipso facto, to the consolidated corporation, the new corporation could become liable therefor only if it expressly assumed the obligations and obtained authority. But theretofore, because the complete plan of consolidation had not been adopted and consolidation of interstate carriers were still to be effected solely under applicable State statutes, the Interstate Commerce Commission could not disregard or set aside the provisions of the State statutes governing the incidents of such consolidations. Therefore, § 143 is applicable here and authorization under § 20a was not required.

It may well be that under the amendment of 1933 the entire subject-matter of operation and control, issuance of securities and assumption of liability may be considered and determined under § 5, paragraph (4), without any reference whatsoever to either § 1 (18) or § 20a,—for the amended § 5 (4) gives the Commission full and plenary power to authorize consolidations or acquisitions of control, upon the terms and conditions and with the modifications found by it to be just and reasonable.

CONCLUSION

The judgment should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 586 15

NEW YORK, CHICAGO & ST. LOUIS RAILROAD COMPANY,

Appellant,

v.

DOROTHEA T. FRANK,

Appellee.

ON APPEAL FROM THE APPELLATE TERM OF THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR REHEARING

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PETITION FOR REHEARING

COMES NOW the appellant in the above entitled case and respectfully prays that a rehearing before a full bench be granted, and that the issuance of the mandate be stayed pending such hearing. In support thereof petitioner respectfully shows:

I.

The judgment of the Appellate Term of the Supreme Court of New York affirming summary judgment for the plaintiff-appellee was affirmed by an equal division of this Court.

The question presented by this appeal is an important one. It involves the jurisdiction of the Interstate Commerce Commission under Section 20a of the Interstate Commerce Act over an important class of security obligations, *i.e.*, those which purportedly attach to consolidated carriers upon consolidation under state law. If the decision of the Appellate Term of the Supreme Court of New York, affirmed by an equally divided Court, becomes the law, then by virtue of state consolidation statutes and without the approval or authorization of the Interstate Commerce Commission consolidated carriers will be compelled to assume the security obligations of their constitutent companies.

The disposition of this question is vitally important to all future consolidations of railroad companies. Under Section 5 of the Interstate Commerce Act the Commission now has jurisdiction to pass upon all proposed consolidations of interstate railroad carriers. The jurisdiction conferred upon the Commission by this Section, however, does not carry with it any authority to authorize or to refuse to authorize such carriers to issue securities or to assume obligations with respect thereto. The only power given the Commission to control such issues or assumptions is that granted by Section 20a. Since any consolidation approved by the Commission under Section 5 can only be effected under state consolidation statutes, it remains important to

determine whether Section 20a gives the Commission control over obligations with respect to securities which purportedly attach to a consolidated carrier upon consolidation pursuant to state law.

It is clear that the Commission itself does not construe its approval of a consolidation under Section 5 as including the approval of any assumption of security obligations incidental to consolidation. In *Rock Island System Consolidation*, 193 I. C. C. 395 (1933), the Commission granted authority under Section 5 for a merger of the Chicago, Rock Island and Pacific Railway with eleven of its subsidiaries. In approving the consolidation the Commission said:

> "It should be understood that this authorization will not include authorization of any issuance of securities or assumption of obligation or liability in respect of securities of others, any such step involved herein being a proper subject for consideration pursuant to application under section 20a of the Act" (193 I. C. C. at 403).[1]

This construction by the Commission of the statutory limits of its jurisdiction over the assumption of obligations with respect to securities is compelled by the language of the Interstate Commerce Act. By the express provisions of Section 5 any order of the Commission approving a pro-

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[1] In *Illinois Terminal Railroad Company Consolidation and Securities*, 221 I. C. C. 676 (1937), the Commission granted separate applications under Section 5 for approval of a consolidation and under Section 20a for the assumption by the consolidated company of security obligations of its constituents. If the Commission had felt that its approval under Section 5 included approval of the assumption of obligations, it would have dismissed the application under Section 20a as unnecessary. *Rock Island System Consolidation, supra*

posed consolidation must be based upon the specific findings which are set out in that Section. But the findings required by Section 5 are quite different from those which the statute requires to support an order authorizing a carrier to assume security obligations under Section 20a. It is therefore important for this Court to determine whether Section 20a vests in the Commission control over such security obligations of constituent companies as purportedly attach to a consolidated corporation upon consolidation pursuant to state law.

II.

The identical question involved on this appeal is presented in at least two cases now pending in the courts of the State of New York.[2] This Court has pointed out that an affirmance by an equally divided Court is as between the parties a conclusive determination and adjudication of the matter adjudged, but the principles of law involved not having been agreed upon by a majority of the Court the decision is not an authority for the determination of other cases either in this or in inferior courts. *Hertz* v. *Woodman*, 218 U. S. 205, 213-14 (1910). The determination by a majority of this Court of the issue presented on this appeal will be controlling in other cases and will therefore save the time and expense of all parties concerned in the pending cases.

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[2] *Friedman* v. *New York, Chicago & St. Louis Railroad Company*, Appellate Division of the Supreme Court of the State of New York, First Department; *Oster* v. *The New York, Chicago & St. Louis Railroad Company*, Supreme Court of the State of New York, New York County.

III.

In the light of the foregoing reasons, it is respectfully submitted that this petition should now be granted, the rehearing to await a full bench, or in the alternative, consideration of the petition should be postponed pending the appointment and qualification of a new Justice, and the mandate of this Court withheld until the final determination of this case by a full bench.

Respectfully submitted,

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I CERTIFY that this petition for rehearing is presented in good faith and not for delay.

WILLIAM J. DONOVAN.

SUPREME COURT OF THE UNITED STATES.

No. 15.—October Term, 1941.

New York, Chicago & St. Louis Railroad Company, Appellant, *vs.* Dorothea T. Frank.	On Appeal from the Appellate Term of the Supreme Court of the State of New York

[December 8, 1941.]

Mr. Justice Jackson delivered the opinion of the Court.

The appellant, commonly known as the Nickel Plate Road, was organized in 1923 as a consolidated corporation under the laws of five states: New York, Pennsylvania, Ohio, Indiana, and Illinois. The agreements and articles of consolidation provided that it should succeed to all of the properties and franchises, contracts, and obligations owned by its constituent companies. Section 143 of the New York Railroad Law, under which the new corporation came into being, provided that "all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it."[1] Among the constituent companies was the Lake Erie & Western Railroad. In connection with a lease of certain properties from the Northern Ohio Railway it had guaranteed payment of principal and interest upon the latter's bonds secured by mortgage on the leased property. Because of the contention that the state law "attached" the obligations of this guaranty to the Nickel Plate, it has now been held liable upon defaulted coupons by a Municipal Court of the City of New York.

[1] The complete text of § 143 of the New York Railroad Law was as follows:

"The rights of all creditors of, and all liens upon the property of, either of such corporations, parties to such agreement and act, shall be preserved unimpaired, and the respective corporations shall be deemed to continue in existence to preserve the same, and all debts and liabilities incurred by either of such corporations shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it. No actions or proceedings in which either of such corporations is a party shall abate or be discontinued by such agreement and act of consolidation, but may be conducted to final judgment in the names of such corporations, or such new corporation may be, by order of the court, on motion substituted as a party."

The appellant defended on two grounds: *First*, that the original guaranty by the Lake Erie was *ultra vires*. This defense was overruled by the state court and nothing of that issue survives for our consideration. *Second*, that approval by the Interstate Commerce Commission was necessary under § 20a of the Interstate Commerce Act before appellant legally could "assume" the obligation[2] and that such approval had not been given. This defense, too, was overruled by the state court, and this federal question comes here by appeal.

In support of this defense the appellant set forth a letter, dated November 25, 1939, from the Secretary of the Interstate Commerce Commission which advised "that the New York, Chicago & St. Louis Railroad Company has never applied for, nor received authorization pursuant to section 20(a) of the Interstate Commerce Act to assume any obligation or liability as lessor, lessee, guarantor, endorser, surety, or otherwise in respect of bonds of the Northern Ohio Railway Company." But it added that "for further information I would refer" to a reported case in which the Commission had said: "That the consolidation had the effect of transferring the guaranty of the Lake Erie to the Nickel Plate appears to be generally assumed by the parties to the reorganization proceeding . . . ."[3]

This reference suggests an examination of the administrative history of the Nickel Plate consolidation and financing to learn what

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[2] § 20a(2) of the Interstate Commerce Act provided that:

"It shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

[3] Akron, C. & Y. Ry. Co. & Northern O. Ry. Co. Reorganization, 236 I. C. C. 214, 216-217.

Compare the following, from a letter written by the Director of the Commission to one Zinman, dated March 19, 1940, referring to the Nickel Plate

administrative application has been made of the statutes in question to the debt structure of this particular appellant.

Shortly after its consolidation the appellant asked the Interstate Commerce Commission to certify under § 1 of the Interstate Commerce Act that public convenience and necessity required the acquisition and operation by it of the railroad lines owned by the constituent companies. It also asked authority under § 20a to issue preferred and common capital stocks in the amounts fixed by the agreements and articles of consolidation. It did not, however, ask under § 5 of the Act for approval of its consolidation. *Acquisition and Stock Issue by N. Y., C. & St. L. R. R.*, 79 I. C. C. 581.

This application required the Commission to construe the Transportation Act of 1920, which had recently introduced a wide range of innovations into the Interstate Commerce Act. Section 5 of the Interstate Commerce Act as amended by the Transportation Act of 1920 directed the Commission to formulate "as soon as practicable" a complete plan for the consolidation of the railways into a limited number of systems. As so amended, § 5 also subjected voluntary consolidations to the approval of the Commission and required that they be approved if found, among other things, to be in harmony with such complete plan for general consolidation and if it appeared that the bonds of the consolidated corporations at par together with the outstanding capital stock at par would not exceed the value of the consolidated properties as determined by the Commission. By adding § 20a the Transportation Act placed the issue of new securities and the assumption of obligations under the control of the Commission. The Act did not, however, provide for federal incorporation or for federal consolidation of carriers, but left the creation of new or consolidated corporations to state laws.

At the time of the Nickle Plate's application for approval of its acquisition and operation of properties and the issue of its stock, the Commission had not completed its valuation of the constituent

guaranty on the Northern Ohio bonds, and appearing in the Commission's file in Acquisition and Stock Issue by N. Y., C. & St. L. R. R., 79 I. C. C. 581:

"As to the matter of assumption of obligation and liability in respect of the securities of others, it is our understanding that no authority was sought nor granted in connection with the application recorded under the above Finance Docket number. It is our further understanding that the consolidated company took the properties, rights, and franchises of the constituent companies, subject to all their debts, obligations, and liabilities, such as might be imposed by the consolidation statutes of the states of the constituent companies. See 82 I. C. C. 365 (366)."

companies nor adopted a complete plan of consolidation. The question arose, therefore, whether under the peculiarities of the statute the Commission was yet authorized to exercise any control over voluntary consolidations and the legal incidents and consequences thereof. On this question the Commission was divided in opinion. Commissioner Eastman, supported by Commissioners Esch and Hall, thought the amendment to § 5 of the Interstate Commerce Act should be construed as being immediately effective to make any consolidation not approved by the Commission unlawful. Had such a view prevailed, the terms of the Nickel Plate consolidation would have been subject to scrutiny at that time. Each item of its debt would have been examined and approved or rejected, and its capital structure, including stock issue as well as debts, would have been tested by the valuation of its properties. The majority opinion, however, held that the Commission's approval under § 5 was unnecessary. It stated: "Applicable State laws afford means to effect the consolidation. Such laws are in force. They are, in fact, the laws to which resort must be had to effectuate consolidations which the interstate commerce act is designed to facilitate. We can not conclude that they have been nullified or superseded. As valid existing laws we have no power to suspend them. Whether State corporations in matters regarding their status as legal entities as distinguished from their participation in interstate commerce may avail themselves of such laws does not depend upon our election or anything we do. Authority in us to withhold approval in the public interest of security issues when State laws permit consolidation does not mean that we may not grant approval when public interest requires that we do so. Furthermore, in the absence of mandatory provisions of a Federal statute we should give full faith and credit to the acts of sovereign States, especially when, as in this case, their action is unanimous." 79 I. C. C. at pp. 585-586. The majority opinion added that the Act did not provide for "compulsory consolidation", that such a provision had been "considered by the Congress and rejected", and that accordingly "it does not seem we should conclude that the Congress intended to prevent voluntary consolidations under available State laws in order thereby to force consolidation under such general plan as we may ultimately adopt." *Id.*, p. 586. It said that "if the Congress had intended to suspend State laws until we should at some later time elect to permit their

use, such intent would have been manifested in plain terms." *Ibid.* The majority of the Commission concluded that by virtue of the state proceedings and notwithstanding the lack of approval by the Interstate Commerce Commission "all things necessary to the completion and consummation of the consolidation have been effected." 79 I. C. C. at p. 583.

The Commission thereupon entered an order giving appellant its formal approval to the issue of new stock, including that to be exchanged share for share for upwards of $23,000,000 par value of the shares in the old Lake Erie Company subject to an agreement to contribute a relatively small part of it to the treasury of the new company, all as provided in the agreements and articles of consolidation.

The Commission did not, in authorizing this stock issue, make any finding that such stock at par together with bonds at par did not exceed the value of the consolidated properties. It made no order approving assumption of any indebtedness of any kind. It appears that the appellant at that time sought no such authority. Approaching maturity of some issues of bonds eventually forced it to take some corporate action, and upon such later occasions it sought and obtained authorization to extend maturity dates and in connection with such extensions to make an express assumption of liability as *primary* obligor.

One of the constituent companies—the old Nickel Plate—had outstanding at consolidation $16,381,000 of a bond issue dated October 1, 1887, maturing October 1, 1937. The assumption of this obligation was not approved until September 17, 1937, at which time the Commission approved a proposal to extend the maturity date for ten years and to assume obligation as primary obligor in respect of the extended bonds. *N. Y., C. & St. L. R. R. Bonds and Assumption*, 221 I. C. C. 772. The published reports of the Commission disclose two instances of similar approval of extension and assumption of primary liability with respect to bonds of the Lake Erie & Western outstanding at the date of consolidation, one as recent as June 7, 1941. *N. Y., C. & St. L. R. R. Assumption of Obligation*, 217 I. C. C. 598; *N. Y., C. & St. L. R. R. Assumption of Obligation*, 247 I. C. C. 71.

It does not appear that either the Nickel Plate or the Commission questioned the Nickel Plate's obligation to pay either interest or principal of the debts of the constituent companies, although

for long periods after the consolidation they were without the Commission's approval. Instead, the Commission has indicated that it regarded the state law as adequate to attach liability to the new company for such debts. In 1923, shortly after the consolidation, the Nickel Plate applied under § 20a of the Interstate Commerce Act to endorse its guaranty of payment upon certain bonds to be issued by a constituent company, and the premise upon which relief was granted was stated by the Commission: "It appears that the consolidation was completed on April 11, 1923, and that the new company is now vested with the property, rights, and franchises of the Nickel Plate and other constituent companies, *subject to all their debts, obligations, and liabilities.*" (Italics supplied.) *N. Y., C. & St. L. R. R. Bonds*, 82 I. C. C. 365, 366. The following year, in dealing with another constituent company, the Commission defined the status of this appellant as follows: "The applicant is the successor, by consolidation, of the Toledo, St. Louis & Western Railroad Company and other companies, and *by virtue of such consolidation* has acquired all property, rights, and powers, *and has assumed all obligations* of the Toledo, St. Louis & Western Railroad Company." (Italics supplied.) *Pledge of Bonds by N. Y., C. & St. L. R. R.*, 86 I. C. C. 465.

The Commission, as well as appellant, as recently as 1938 gave unmistakable recognition to the validity of the guaranty on which appellee has recovered. This appears from the reorganization proceedings under § 77 of the Bankruptcy Act involving the properties of the Northern Ohio, the original obligor whose payments were guaranteed by appellant's constituent company, the Lake Erie & Western. The Commission stated that: "*From the consolidation* of the Lake Erie & Western with the New York, Chicago & St. Louis, *resulting liability* of the latter on the Lake Erie's guaranty of the Northern's bonds *thus is apparently admitted.*" (Italics supplied.)[4] Upon that premise the Commission

[4] Akron, C. & Y. Ry. Co. and Northern O. Ry. Co. Reorganization, 228 I. C. C. 645, 647.

The plan approved by the Commission provided:

"Appropriate securities of the new company as hereinafter noted, consistent with the other provisions of the plan, with which to recompense the New York, Chicago and St. Louis Railroad Company for the debtor's and the intervening debtor's liability to it for amounts expended in the performance of its guaranty of the first-mortgage bonds of the intervening debtor, shall be issued and held in treasury." *Id.*, pp. 679-680. Also, "The New York, Chicago & St. Louis Railroad Company, upon presentation to the treasurer of the new company of appropriate proof of loss sustained in the performance of its con-

made allowance in the plan of reorganization for the indemnification of the appellant because, if required to make good on the guaranty, it would become subrogated to the rights of the Northern Ohio bondholders as a mortgage creditor and would become a general creditor in the amount of any deficiency.

We draw the following conclusions from this history of the Nickel Plate's experience before the Interstate Commerce Commission:

By its decision in *Acquisition and Stock Issue by N. Y., C. & St. L. R. R.*, 79 I. C. C. 581, the Commission adopted the construction of the Transportation Act which the Nickel Plate urged upon it and held itself precluded from supervision of the consolidation under § 5. This Court subsequently approved that construction in *Snyder* v. *N. Y., C. & St. L. R. R.*, 118 Ohio St. 72, 278 U. S. 578, holding that the Nickel Plate had the rights of a *de jure* corporation notwithstanding its failure to have its creation by con-

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tract of guaranty of bonds of the intervening debtor, shall receive of the new company stock issued in reorganization and held in treasury, for each $100 of loss so proved, $22.79, par value, of new common stock; and shall participate equally and ratably with the holders of class A warrants in any distribution of stock pursuant thereto, each $100 of approved loss entitling the New York, Chicago & St. Louis Railroad Company to participate in the distribution to the same extent as one class A warrant." *Id.*, pp. 681-682.

The true inwardness of these provisions of the reorganization plan appears from the opinion:

"The New York, Chicago & St. Louis should be treated as though having a claim equal to the losses it will sustain in the performance of its guaranty. The mathematical maximum of this claim would be equal to the principal of the outstanding Northern bonds plus the four years of overdue interest thereon, or $3,000,000. The probable maximum would be very much less, but cannot be determined on any definite basis. Securities should accordingly be reserved pending performance of the New York, Chicago & St. Louis guaranty on the basis of its having a $3,000,000 claim." *Id.*, p. 673.

The securities, however, thus set aside to the Nickel Plate were to come back to others "as may be made possible through the New York, Chicago & St. Louis settling with the Northern bondholders, or otherwise discharging its liabilities, for less than the maximum. . . ." *Id.*, pp. 673-674.

An effort was apparently made to get rid of this obligation, in part at least, in the reorganization; but the Commission held that this guaranty ran to each Northern bondholder individually, and that the Nickel Plate could not deal with the bondholders as a class, on the ground that there appeared to be no provision in § 77 "for enforcing on all in lieu of the guaranty a compromise that may be agreeable to a majority but not acceptable to a minority, and no provision for discharging in these proceedings the New York, Chicago & St. Louis, a solvent obligor able to meet its debts as they mature, from any of its obligations. It follows that a provision in a plan of reorganization of the debtors, pursuant to section 77, releasing the guaranty, would be of such doubtful validity as to require our disapproval, and that settlements for this guaranty should be made separately from the plan of reorganization. . . ." *Id.*, p. 667.

solidation approved by the Commission, on the ground that the consolidation took place at a time when § 5 had "not as yet become applicable."

It seems clear that the Commission applied a like construction of its powers under § 20a over the assumption of the debts and liabilities of the constituent companies. That it deliberately deferred to a later day consideration of all debts seems the correct inference from its express *caveat* that "Nothing in this report shall be construed as restricting the commission in its action with respect to the promulgation of a complete consolidation plan or upon the subject of valuation." 79 I. C. C. at p. 585. Even apart from this *caveat*, it is clear that the Commission's failure at this time to make either order or investigation with reference to any debts or liabilities was due to no delusion that the Nickel Plate was being launched as a debt-free railroad. It was a matter of common knowledge that the constituent companies were heavily in debt for which no provision had been made other than by attachment to the new corporation under state law. This and the resulting burden of fixed charges on the revenues of the new company were well known to the Commission.[5] The disappearance of all debt from consideration by the Commission cannot be accounted for except on the ground that the Commission held itself without jurisdiction to deal with it until the company should propose some action of its own, such as extension, endorsement, or issue of substitute securities—as distinguished from the effect of the law of consolidation on the fact of pre-existing debts. That such was the holding is further indicated by the Commission's subsequent handling of the obligations of the constituent companies.

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[5] The application of the Nickel Plate asked authority to issue 327,200 shares of preferred stock and 462,479 shares of common stock to be exchanged share for share for the stocks of the constituent companies. It included a general balance sheet of each constituent company and a consolidated balance sheet showing long-term debts of the constituent companies aggregating $78,897,000, which items and exact amounts were carried into the consolidated balance sheet.

The Lake Erie & Western Railroad Company was shown to have outstanding capital stocks with a par value of $23,680,000, $13,895,600 of long-term debt, and $4,996,944 of "deferred liabilities." The stock was replaced with a like amount of stock in the new company, and the debt and "deferred liabilities" were carried in full into the consolidated balance sheet under the same headings. The obligation in suit was not specified; perhaps it was included in "deferred liabilities."

A Stockholders' Protective Committee of the old Nickel Plate filed objections to the plan of consolidation, one of the grounds of which was the alleged assumption of a heavy bond indebtedness ahead of the stock, and complaint was specifically made of the indebtedness of the Lake Erie & Western.

Whether we would agree with the Commission's interpretation of the Act as an original matter, it is not necessary to decide. Considerations of public interest certainly should have weighed heavily in favor of the Commission, had it asserted power to review the debts of the new company before giving even tentative and formal approval to capitalization of its equity. What we must now decide is the present effect of the Commission's interpretation of its powers as to the indebtedness of this particular appellant, woven as it has been, by a series of actions by the Commission, into the whole financial fabric of this important carrier system. We are now asked blindly to unravel we know not what by reversing a consistent and long-standing interpretation of § 20a by the administrative body to which its enforcement was committed.[6] We are asked to do this to the enrichment of a stockholder equity which itself was capitalized with no thorough scrutiny by virtue of the same interpretation. We are asked to do this although the Commission with knowledge of the claim of illegality has set aside securities in the Akron reorganization to compensate it in some measure and has made no effort to enjoin the Nickel Plate from using its revenues to satisfy in part at least the claims of these bondholders.

Under the circumstances of this case the administrative interpretation on which the Commission has acted in its long course of dealing with Nickel Plate affairs should not be upset. *United States* v. *Chicago North Shore R. Co.*, 288 U. S. 1.

The judgment appealed from is affirmed.

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[6] This interpretation is not inconsistent with the Commission's practice in other cases. Assumption of Obligation by Hudson River Connecting R. R., 72 I. C. C. 595, dealt with assumption of liability on a mortgage which the applicant had agreed to assume as part of the purchase price of a piece of land. It had no connection with any consolidation proceeding. Rock Island System Consolidation, 193 I. C. C. 395, was decided after amendment of § 5 by the Emergency Railroad Transportation Act approved June 16, 1933. The Commission had by the time of that decision promulgated a plan of consolidation, and it found that the Rock Island consolidation would be "in harmony with and in furtherance of the plan." *Id.*, p. 403. It was the absence of such a plan that defeated jurisdiction of the Commission to approve the Nickel Plate consolidation. Snyder v. N. Y., C. & St. L. R. R., *supra.*

SUPREME COURT OF THE UNITED STATES.

No. 15.—October Term, 1941.

New York, Chicago & St. Louis Railroad Company, Appellant, *vs.* Dorothea T. Frank.	Appeal from the Appellate Term of the Supreme Court of the State of New York.

[December 8, 1941.]

Mr. Justice Douglas.

While I agree with the opinion of the Court, I think an elaboration of the point, which is the nub of the case, is desirable in view of certain observations in the dissenting opinion.

Appellant is a corporation formed under § 141 of New York Railroad Law which provides for consolidation of railroad corporations. On the filing of the articles or agreement of consolidation, the several constituent companies "shall be one corporation by the name provided in such agreement". And § 141 also provides that "such act of consolidation shall not release such new corporation from any of the restrictions, liabilities or duties of the several corporations so consolidated." By § 143 all debts of the constituent companies "shall thenceforth attach to such new corporation, and be enforced against it and its property to the same extent as if incurred or contracted by it." We are pointed to no provision of the New York law which would permit the creation of the new consolidated corporation without the attachment of the debts of the constituent companies.

Snyder v. *New York, Chicago & St. Louis R. R. Co.*, 118 Oh. St. 72, aff'd 278 U. S. 578, held that authority from the Commission was not necessary to create this consolidated corporation. A necessary and inherent incident of its creation was the attachment of these obligations. Hence, I do not see how we can say that although authority from the Commission was not necessary to create appellant, such authority was necessary in order for this consolidated corporation to meet the requirements which the New York law exacted as conditions to its creation. But if we held that an attachment of liability under the New York Consolidation Act was

an "assumption" of liability within the meaning of § 20(a), we would be doing just that. Hence, I feel forced to conclude that in case of this type of consolidation "assumption" in § 20(a) does not include attachment of liability by virtue of the filing of articles of consolidation under a state statute, though it would of course include the issuance of any security or the incurrence or extension of any obligation subsequent to consolidation. Such is one consequence of the failure to follow Commissioner Eastman's views in *Acquisition and Stock Issue of N. Y., C. & St. L. R. R.*, 79 I. C. C. 581. But I do not see how in all fairness we can reopen at this late stage the unfortunate decision in the *Snyder* case.

SUPREME COURT OF THE UNITED STATES.

No. 15.—October Term, 1941.

New York, Chicago & St. Louis Railroad Company, Appellant, *vs.* Dorothea T. Frank. | Appeal from the Appellate Term of the Supreme Court of the State of New York.

[December 8, 1941.]

Mr. Chief Justice Stone.

I think the judgment should be reversed, but without prejudice to any right of appellee to recover under § 20(a)(11) of the Interstate Commerce Act.

I am not now prepared to say that appellee could not have recovered under the provisions of § 20(a)(11) had counsel seen fit to present the question for decision.[1] But the only question which they have briefed and argued here is whether § 20(a)(. precludes the imposition of the asserted liability upon appellant where, as is the case here, its assumption by appellant has not been approved by order of the Commission as required by that section. The Court avoids decision of this question by declaring that the Commission has declined to give its approval because it has construed § 20(a)(2) as inapplicable and that we are bound by that construction.

Examination of the Commission's opinions and orders from which the Court draws its cryptic answer to the question before us

[1] 49 U. S. C. § 20(a)(11), after providing that assumptions of obligations not approved by the Commission are void, declares:

"If . . . any security in respect to which the assumption of obligation or liability is so made void, is acquired by any person for value and in good faith and without notice that the . . . assumption is void, such person may in a suit or action in any court of competent jurisdiction hold jointly and severally liable for the full amount of the damage sustained by him in respect thereof, the carrier which . . . assumed the obligation or liability so made void, and its directors, officers, attorneys, and other agents who participated in any way . . . in the authorizing of the assumption of the obligation or liability so made void."

It appears from the record, in an affidavit upon which summary judgment was granted, that in 1936, after the consolidation, appellee purchased the bonds from a broker for value "without notice of any defense thereto or to the guarantee thereof."

makes it plain that the Commission has placed no such construction on the statute in any case, and that in the cases cited relating to the Nickel Plate consolidation it has never had any occasion to construe § 20(a)(2). On the contrary, in several cases, the Commission has construed § 20(a)(2) as applicable to obligations like the present, which "attach" by operation of state law to the acquisition by the carrier of the property of other roads, and in conformity to that section has approved the "assumption" of such liability by the carrier.

In the cases before the Commission on which the Court relies it appears that the Commission was not asked to pass upon the question now before us and did not purport to pass upon it. The opinion of the Court thus rests on no more substantial basis than the circumstance that the Commission has acted favorably on an application of appellant to be permitted to operate the consolidated lines and to issue securities in conformity to the plan of consolidation, in a proceeding in which the Commission was neither asked to take nor took any action with respect to assumption of liabilities; and this under a statutory scheme of control which plainly contemplates that a consolidation may go into effect without adoption of its assumption of liability feature, which in any case can become operative only by order of the Commission approving it upon application and on findings that the public interest will be served. *Rock Island System Consolidation*, 193 I. C. C. 395, 403-04; *Acquisition and Stock Issue by P., O. & D. R. P.*, 105 I. C. C. 189, 193. The Court infers the Commission's refusal to approve the assumption of liability for want of jurisdiction from the silence and inaction of the Commission when it was not called upon to speak or to act either by the statute or by any application pending before it.

Section 20(a)(2) of the Interstate Commerce Act contains two prohibitions. One is imposed on the issuance of securities by railroads without approval of the Commission. The other makes it unlawful for such a carrier to assume any obligation in respect of securities issued by others "even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of . . . the proposed assumption of obligation . . . the Commission by order authorizes such issue or assumption." The statute commands with particularity that "The Commission shall make such order only

if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose."

It will be noted that there is no requirement of the statute that applications for the acquisition of other roads or for the approval of security issues, and applications for approval of the assumption of guarantee obligations, shall be united in a single proceeding. Indeed it is clear that the statute leaves the Commission free to approve the one and reject an application for the other. And it appears that the uniform practice of the Commission has been, as the statute directs, to entertain neither, except on an application asking the desired approval. And where more than one is asked, the Commission has by its order separately dealt with those upon which it intended to act. E. g., *Acquisition of C. & O. Northern Ry. Co. by C. & O. Ry.*, 70 I. C. C. 550; *Gainesville Midland Reorganization*, 131 I. C. C. 355; *Control of Greenbrier, Cheat & Elk R. R.*, 131 I. C. C. 525; *Chicago, M. St. P. & P. R. Co. Acquisition*, 158 I. C. C. 770; *Elmira & L. O. R. Co. Acquisition*, 170 I. C. C. 127.

The Commission has pointed out that its action in passing on applications under each of the paragraphs 18 to 20 inclusive, of § 1, or under § 5(2), of the Act is limited to the particular provision of the Act on which the application is founded, and is not to be construed as a decision on any other provision. See *Acquisition of Line by O. C. S. L. Ry.*, 86 I. C. C. 273, 274; *Acquisition by A., T. & S. F. Ry.*, 138 I. C. C. 787, 789; *Acquisition by St. L.-S. F. Ry.*, 145 I. C. C. 110, 114; *Chicago, Milwaukee & St. Paul Reorganization*, 131 I. C. C. 673, 691-92; *New York Central R. Co. Assumption*, 158 I. C. C. 317, 320-23; *Pacific Coast R. Co. Acquisition*, 187 I. C. C. 563 and 189 I. C. C. 79. Cf. *Keeshin Transcon. Freight Lines, Inc.—Debentures*, 5 M. C. C. 349, 351. In fact, the Commission has said that § 20(a)(2) "confers upon us power to grant or deny authority to issue securities or to assume obligation or liability . . . only upon application by the carrier for such authority". *New York Central R. Co. Assumption*, 158 I. C. C. 317, 322.

In the Commission's view authority to consolidate includes the authority to acquire and operate properties of other roads, but neither that authority nor the authority to issue securities upon consolidation includes authority to assume liabilities of the constituent companies. *Rock Island System Consolidation*, 193 I. C. C. 395, 403-04; *Santa Fe Trail Transp. Co.—Merger*, 5 M. C. C. 324, 328; cf. *Illinois Terminal R. Co. Consolidation and Securities*, 221 I. C. C. 676. The Court's suggestion that this was not so before the Commission promulgated its general plan of consolidation under § 5, is contrary to the ruling in *Acquisition & Stock Issue by P., O. & D. R. R.*, 105 I. C. C. 189. In that case, before the promulgation of the plan, the Commission was at pains to warn (p. 193) that its approval of an issue of securities to carry out a consolidation under state law did not involve any decision on assumption of liability of the obligations of the consolidated company's constituents. *Assumption of Obligation by L. S. & I. R. R.*, 86 I. C. C. 640, and *Grand Trunk W. R. Co. Unification and Securities*, 158 I. C. C. 117, 138, 142-43, both decided before the promulgation of the plan, granted permission to assume the obligations of the constituents and thus gives further proof that the Commission, when it intended to take any position with respect to the assumption of obligations in connection with a consolidation, did so by action affirmatively expressed rather than by silence.

The Commission has entertained applications for the approval under § 1 of the Act of the operation of acquired properties or for approval of security issues upon consolidation without any application for the approval of the assumption of the liabilities involved. See *Acquisition and Stock Issue by N. Y., C. & St. L. R. R.*, 79 I. C. C. 581; *Pacific Coast R. Co. Acquisition*, 187 I. C. C. 562; cf. *Rock Island System Consolidation*, 193 I. C. C. 395, 403-04. And in the case of this appellant, as of other roads, it has later entertained and disposed of separate applications for the approval of the assumption of the obligations involved. *N. Y., C. & St. L. R. Co., Assumption of Obligations*, 217 I. C. C. 598; *N. Y., C. & St. L. R. Co. Bonds and Assumption*, 221 I. C. C. 772; *N. Y., C. & St. L. R. Co. Assumption of Obligation and Liability*, 247 I. C. C. 71; *St. Louis S. F. Readjustment*, 145 I. C. C. 218; *Pacific Coast R. Co. Securities*, 189 I. C. C. 79; *Cincinnati Union Term. Co. Securities*, 166 I. C. C. 419 and 499, and 184 I. C. C. 619; *West Jersey & S. R. Co. Bonds*, 217 I. C. C. 125; cf. *Assumption of Obligation by N. O., T. & M. Ry.*, 94 I. C. C. 218.

Such action by the Commission plainly precludes any inference that in approving an application for the operation of the consolidated lines or an issue of securities under a consolidation, it was doing more than responding to the petition presented to it or that it was undertaking to pass on the legality or propriety of the assumption by the consolidated road of guarantee obligations of its constitutent companies. We are pointed to nothing suggesting that the Commission has ever regarded such approvals as involving an unasked determination with respect to the assumption by the consolidated carrier of the obligation of its constituent companies.

There is thus no plausible ground for saying that there was lurking in the Commission's decision in 79 I. C. C. 581 some implied ruling as to the construction of § 20(a)(2) and some implied refusal to act because of that construction in a situation in which it was not asked or expected to act and in which, for reasons already stated, it was under no duty to act. In none of the cases cited in the opinion of the Court as hinting at a possible construction by the Commission of § 20(a)(2) was it asked to make any finding or order with respect to the assumption by appellant of obligations of its constituent companies. In none did it make or decline to make any of the findings or the order required by § 20(a)(2) with respect to such obligations. In none did it express any opinion whether obligations attaching to a consolidated carrier are within the prohibition of the statute, or as to its duty to approve or disapprove of their assumption.

In *Operation of Lines and Issue of Capital Stock by the N. Y., C. & St. L. R. R. Co.*, 79 I. C. C. 581, the Commission was asked to and did specifically approve the operation by appellant of the consolidated line and the issuance of certain stock by appellant, pursuant to the consolidation plan, and nothing more. It made no mention of any assumption of obligation by appellant or of the assumption provisions of § 20(a)(2). It neither took nor declined to take action affecting such assumption. For all that appears the Commission in its examination of the capital structure and the balance sheet of appellant may have disregarded the guarantee obligation as one not affecting the consolidated company because its assumption had not been approved by the Commission.

It construed the consolidation provisions in § 5 of the Act as permitting carriers to consolidate under state law without first securing the Commission's authorization for the consolidation it-

self. Whether or not this was the necessary interpretation of the consolidation provisions, cf. *Snyder* v. *New York, C. & St. L. R. R.*, 278 U. S. 578, nothing in the report of the Commission's decision suggests that if it was essential, in order to carry out the consolidation under state law, that obligations be "assumed", then the assumption could be accomplished without compliance with § 20(a)(2). Its decision is in fact inconsistent with any such theory, and affords affirmative evidence that the Commission thought § 20(a)(2) was operative notwithstanding the narrow interpretation which it gave to § 5.

The Commission authorized appellant to issue, under § 20(a)(2), certain preferred and common stock, to be exchanged for the stock of its five constituent companies in carrying out the consolidation. If consolidations under state law could, in the Commission's view, be effected at that time wholly without regard to § 20(a)(2), then the granting of authority to issue the stock would have been superfluous. That the Commission deemed such authority necessary is persuasive that it regarded § 20(a)(2) as applicable to all issues of securities, or assumptions of obligations, which occurred in connection with a consolidation. Freedom to consolidate, in the Commission's view, plainly did not include freedom to make adjustments in capital structure without the authorization required by § 20(a)(2). Hence the only real question is whether an obligation assumed or attaching merely by operation of law is an "assumption" within the meaning of § 20(a)(2)—a question which as will presently appear the Commission has consistently answered in the affirmative whenever it has been called upon to give an answer.

Subsequent proceedings before the Commission affecting appellant, in the cases on which the Court relies, presented no question of its liability upon the guarantee obligations of its constituent companies and are equally barren of any indication that the Commission considered the meaning and application of the assumption provisions of §20(a)(2) or that it had any occasion to do so. In *N. Y., C. & St. L. R. R. Bonds*, 82 I. C. C. 365, and in *Pledge of Bonds by N. Y., C. & St. L. R. R.*, 86 I. C. C. 465, next cited by the Court as sustaining its decision, the questions presented to the Commission had not even a remote relation to any assumption by appellant of guarantee obligations, resulting from the consolidation, which the Commission had not by its order approved. In the

one case the application was for authority to make a new bond issue; in the other for permission to pledge some of its own assets to secure a new note issue. Passing references by the Commission, in recounting the history of the consolidation, to the fact that appellant had acquired the properties of constituent companies "subject to all their debts, obligations and liabilities" and that it "has assumed all obligations" of a different constituent company from that here involved, can hardly be accepted as evidence of an unasked administrative construction of a provision of a statute which it was not administering and with respect to which it expressed no opinion.

The Court gains no support for its conclusion from the supposed recognition by the Commission in the *Akron* case that the "resulting liability" from appellant's consolidation had been "apparently admitted". *Akron, C. & Y. Ry. Co. & Northern O. Ry. Co. Reorganization*, 228 I. C. C. 645, 647. The bankruptcy reorganization, whose approval by the Commission was there sought, was that of the Northern Ohio Railway, the guarantee of whose bonds is presently involved. What had "apparently" been "admitted" by the proposed reorganization was that so far as appellant should perform or be compelled to perform the guarantee, it would become a creditor of the new company, entitled to participate in the new securities to be issued to creditors under the reorganization. The only action taken by the Commission with respect to the obligation was to approve (p. 673) the provision of the plan, which reserved new securities of the reorganized company for the satisfaction of appellant's claim "pending performance", if any, of the guarantee, by appellant, and to order (p. 684) the reorganized company to issue to appellant its proportion of the new securities upon "appropriate proof" by appellant "of loss sustained in the performance of its contract of guarantee". The Commission thus had no occasion to determine the question which appellant asks to have determined here, and pointedly left it undecided. Obviously the approved plan gave appellant a powerful incentive to resist performance of the guarantee and manifestly did not purport to foreclose appellant from securing the adjudication of the liability which it seeks here.

Not only do these cases fail to disclose any self-denying construction of § 20(a)(2) by the Commission, but in others where the Commission has been called on to consider the question it has taken the position that the word "assumption" in § 20(a)(2)

includes an obligation placed upon the carrier merely by operation of the state law under which it had acquired property.

Three times since its decision in 79 I. C. C., the Commission has granted the application of appellant to be permitted to extend and also to assume obligations of its constituent companies. *N. Y., C. & St. L. R. Co. Assumption of Obligations*, 217 I. C. C. 598; *N. Y., C. & St. L. R. Co. Bonds and Assumption*, 221 I. C. C. 772; *N. Y., C. & St. L. R. Co. Assumption of Obligation and Liability*, 247 I. C. C. 71. In two of these cases, the Commission authorized appellant to assume obligations of the Lake Erie & Western—the same constituent company whose obligation is now said to have been assumed without the necessity of the Commission's authorization. If appellant was already personally liable on the obligations, permission to assume them was unnecessary. And since the Commission does not entertain applications for authority to assume obligations where it is of the opinion that the obligation is not one to which § 20(a)(2) applies, *Southern Pacific Co. Assumption of Obligations*, 189 I. C. C. 212, 213; *Bonds of A. & M. Railway Bridge & Term. Co.*, 94 I. C. C. 79, 81; *Mo.-K.-T. R. Co. Assumption of Obligation*, 212 I. C. C. 217; *Pittsburgh & Shawmut R. Co. Securities*, 166 I. C. C. 503, 505, its action in authorizing the assumptions, in addition to the extensions, is inconsistent with any inference on our part that it had previously ruled that the obligations assumed were not required to comply with § 20(a)(2).

On the contrary, the Commission applied that section to obligations like the present soon after enactment of the Transportation Act of 1920. In *Assumption of Obligation by Hudson River Connecting R. R.*, 72 I. C. C. 595, decided nine months before its decision in 79 I. C. C., the Commission took jurisdiction of an application for approval of an assumption of obligation resulting by operation of New York law from a carrier's acquisition of property. In granting the application and in authorizing the carrier to "assume" the attached obligation the Commission stated, page 496:

"While the applicant does not propose to make any indorsement on the bonds, or execute any agreement in respect of the payment of them, it appears that, under the laws of New York, the acceptance of a deed conveying land subject to a mortgage indebtedness, which the grantee agrees to assume, has the effect of making the land the primary fund for the payment of the mortgage indebtedness, so that the grantee becomes the principal debtor and the grantor a surety".

The Commission made the findings prescribed by § 20(a)(2) and ordered that the applicant be "authorized to assume obligation and liability" in respect of the mortgaged bonds, "said assumption of obligation and liability . . . to be accomplished by the acceptance by the applicant of a deed of said lands".

More recently, in *Public Service Coordinated Transport—Assumption of Obligation*, 15 M. C. C. 406, a motor carrier case under § 214 of the Interstate Commerce Act, which incorporates by reference § 20(a)(2), the Commission reaffirmed its earlier construction of § 20(a)(2) as applying to obligations like the present, saying (p. 408):

"Prior to consummation of the merger, applicant's liability in respect of the bonds of said companies was of a contingent nature. Under the statutes of New Jersey all debts and liabilities of merged or consolidated corporations shall thenceforth attach to the consolidated corporation and may be enforced against it to the same extent as if said debts and liabilities had been incurred or contracted by it. Thus, through completion of said merger, applicant has, by operation of law, become the principal obligor in respect of these bonds, and, as such, has obligations and liabilities in respect thereof which differ from the contingent liability previously existent. In our opinion assumption of such obligations and liabilities as successor in title is a matter over which we have jurisdiction."[2]

While courts are not necessarily bound by the Commission's construction of the Interstate Commerce Act, *Mitchell* v. *United States*, 313 U. S. 80; *United States* v. *Chicago etc. R. Co.*, 282 U. S. 311, they rightly pay deference to the Commission's considered construction of it, especially when it is of long standing and has never been departed from. But it is novel doctrine that a provision of an act of Congress may be nullified by a construction

[2] See also *Elmira & L. O. R. Co. Acquisition*, 170 I. C. C. 127, where the Commission approved an "assumption" of liability which was apparently to attach (see p. 128) solely by operation of the New York stock corporation laws. Cf. *Assumption of Obligation by L. S. & I. R. R.*, 86 I. C. C. 640, where in authorizing an "assumption" the Commission stated: "Under the agreement and the laws of Michigan the debts, liabilities, and duties of the last two companies named attach to the applicant and are enforceable against it to the same extent and in the same manner as if originally incurred by it. The applicant accordingly seeks authority to assume obligation and liability in respect of the securities of these companies." Cf. also *Union R. Co. Assumption of Obligation and Liability*, 217 I. C. C. 635, where, in authorizing an assumption the Commission stated: "Pursuant to the terms of the joint agreement of merger dated October 1, 1936, and the provisions of the laws of the Commonwealth of Pennsylvania, the applicant will assume all the debts and obligations of the" constituent corporations.

of the Interstate Commerce Commission which can be inferred only from the fact that the Commission ignored the provision in a proceeding in which, by its settled practice, it was not called upon to construe or apply it. Certainly the Commission does not appear ever to have acted upon any such view, nor has it come before us to advocate it. It seems plain that the rulings of the Commission that § 20(a)(2) is applicable to those obligations which state law attaches to the carrier in consequence of its participation in a consolidation, as well as to those which attach to it by reason of its expressed promise, carry out the purposes of the statute and are consistent with its language. Section 20(a)(2) was enacted to prevent the imposition on the railroads of the country, through consolidation or otherwise, personal liability for the obligations of other roads, such as had occurred in certain well known consolidations notorious for their disregard of the interests of security holders and the public. See 58 Cong. Rec. 8317-18. As the effective means of prevention it prescribed that all such obligations should be void, unless the Commission orders their approval as compatible with the public interest.

But even if we assume that the silence of the Commission in 79 I. C. C. can be taken to intimate a view of the meaning of § 20(a)(2), with respect to which it took no action and made no order, it seems still more novel to say that such an inference must control our decision here in the face of its explicit construction of the statute in other cases as applicable to situations like the present. Even sporadic and inconsistent administrative decisions, where the parties have relied upon them, may sometimes both be followed by courts when applied to those parties. But the unarticulated intimations of opinion of an administrative body, unacted upon, are too inconclusive to control judicial decision. Courts are not like weathercocks, changing with every administrative wind that blows. They cannot on the same day rightly decide that the same statute means different things in different cases, merely because the Commission may on different days have had shifting impressions which it has not thought sufficiently important to express in any ruling, opinion, decision or order.

United States v. *Chicago North Shore R. Co.*, 288 U. S. 1, upon which the Court relies, has no significance here. It is one thing to accept judicially the Commission's decision that a particular carrier is an "interurban electric railway", a determination unquestionably within its power and peculiarly within its administrative compe-

tence. It is quite another to bind the courts by a construction of the statute which the Commission has never voiced but which, on the contrary, it has consistently denied, namely, that obligations may be assumed without conscious and express permission of the Commission and in defiance of the declared will of Congress.

It is impossible to believe that the all-inclusive provisions of § 20(a)(2), passed in response to a general and long-felt need for the federal regulation of railroad capitalization, were intended to exclude assumptions of obligations which attach by virtue of state law. The statute makes § 20(a)(2) subject only to one exception—short-term notes maturing in not more than two years, § 20(a)(9)—and even in that instance the carrier is required to file with the Commission a certificate of notification. No other exception was provided, and it is apparent that none was intended.[3]

We are not concerned here with doubts whether appellant is validly organized under New York law. No such issue is presented by the record. The only question before us is whether personal liability can be assumed by appellant without complying with the statute, which makes such an assumption void "even though permitted by the authority creating the carrier corporation" "unless and until,

[3] Examination of the historical background of § 20(a) can leave no genuine doubt that the financial provisions of § 20(a)(2) were meant to be all-inclusive. Abuses in railroad financing had been a continuous subject of public concern. See the report of the Windom Committee in 1874, S. Rep. No. 307, 43rd Cong., 1st Sess., Vol. I, pp. 71-76; the report of the Cullom Committee in 1886, S. Rep. No. 46, 49th Cong., 1st Sess., part I, pp. 51-52. In 1907 the Interstate Commerce Commission, reporting upon its investigation of the Union Pacific and the Chicago & Alton railroads, recommended federal regulation of security issues. *In re Consolidations and Combinations of Carriers*, 12 I. C. C. 277; and see also the Commission's Annual Report for 1907, p. 24. In 1910 President Taft urged upon Congress federal regulation of railroad securities, 45 Cong. Rec. 380, but the Senate's opposition prevented the proposal from being included in the Mann-Elkins Act. In 1913 the Commission concluded its *New England Investigation*, 27 I. C. C. 560, 616, with the recommendation that "No interstate railroad should be permitted to lease or purchase any other railroad, nor to acquire the stocks or securities of any other railroad, *nor to guarantee the same, directly or indirectly*, without the approval of the federal government." Senate opposition again proved too strong in 1914, as well as in 1916, but by the end of the war opposition to the regulation of railroad capitalization practically disappeared. See Locklin, Regulation of Security Issues by the Interstate Commerce Commission, pp. 12-22; Sharfman, The Interstate Commerce Commission, Vol. I, pp. 86-94, 189-93; and the Commission's Annual Report for 1919, pp. 4-5.

Section 20(a) when finally enacted was thus a thoroughgoing reform, long considered and at last virtually unopposed, designed to vest in the Commission "exclusive and plenary" jurisdiction, § 20(a)(7), over changes in the capital structures of the railroads. Its enactment, see Sharfman, *op. cit., supra*, Vol. I, p. 190, "was not only a fulfilment of the Commission's repeated recom-

and then only to the extent that" the Commission has approved the assumption after making the prescribed findings.

The statute does not deprive the holders of obligations of the constituent companies of any rights against them or their property. It only prevents the acquisition by such holders, contrary to the public interest, of new rights against the consolidated carrier without the consent of the Commission, and by § 20(a)(11) the statute gives a remedy to those who like appellee become innocent purchasers of such securities, after consolidation, for the loss of such rights through the operation of § 20(a)(2). The application of the statute in this case no more involves enriching stockholder equities than in any other. The question in every case is whether the public, and railroad security holders, shall be burdened, through repeated reorganizations of railroads, with excessive indebtedness which it was the purpose of the statute to prohibit. It is obvious that the statute would fail of its proclaimed purpose unless, as the Commission has ruled, its prohibitions extend to those obligations which the consolidated carrier assumes by virtue of its entering into a consolidation under state law, as well as those which it assumes by its expressed promise. The words of the statute neither compel nor persuade to the decision now given, which seems to rest on nothing more substantial than a far-fetched surmise. It defeats the Congressional purpose and conflicts with the legislative history and administrative construction of the statute.

Mr. Justice Reed, Mr. Justice Frankfurter and Mr. Justice Byrnes join in this opinion.

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mendations, but grew out of a practical unanimity of opinion among the numerous and diverse interests that sought to influence the character of the new legislation. While this extension of the Commission's authority was designed, indirectly, to protect the investing public against the dissipation of railroad resources through faulty or dishonest financing, its dominant purpose was to maintain a sound structure for the rehabilitation and support of railroad credit, and for the consequent development of the transportation system. It aimed to render impossible the recurrence of the various financial scandals, with their destruction of confidence in railroad investment, which had become notorious, and to prevent the subordination of the carriers' stake as transportation agencies to the financial advantage of alien interests."